

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,

vs.

WALTER EUGENE LITTERAL,

Defendant.

DOCKET NO. 3:15-CR-221

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE FRANK D. WHITNEY
UNITED STATES CHIEF DISTRICT COURT JUDGE
TUESDAY, JUNE 28, 2016 AT 10:15 A.M.

APPEARANCES:

On Behalf of the Government:

MICHAEL E. SAVAGE, ASSISTANT U.S. ATTORNEY
U.S. Attorney's Office
227 W. Trade Street, Suite 1650
Charlotte, North Carolina 28202

On Behalf of the Defendant:

JOHN PARKE DAVIS, ESQ.
Federal Defenders of Western North Carolina
129 West Trade Street, Suite 300
Charlotte, North Carolina 28202

JILLIAN M. TURNER, RMR, CRR, CLR
Official Court Reporter
United States District Court
Charlotte, North Carolina

I N D E X

	PAGE
GOVERNMENT'S WITNESSES	
MARK MOSS	
Direct Examination by Mr. Savage	9
Cross-Examination by Mr. Davis	15

1 (Tuesday, June 28, 2016 at 10:15 a.m.)

2 P R O C E E D I N G S

3 (Counsel and defendant present.)

4 THE COURT: Good morning.

5 MR. SAVAGE: Good morning, Your Honor.

6 THE COURT: I appreciate counsel allowing me to
7 push this hearing forward a little bit in time. We finished
8 our earlier hearings more quickly than anticipated. I
9 believe this one will take a little long longer, so it's
10 better to start early.

11 We are here in United States v. Walter Eugene
12 Litteral, Case 3:15-CR-221, for Mr. Litteral --

13 And am I saying that correctly, Mr. Davis,
14 Litteral?

15 MR. DAVIS: You are, Your Honor.

16 THE COURT: -- Mr. Litteral's sentencing. And
17 Mr. Davis is here on behalf of the defendant, and Mr. Savage
18 is here on behalf of the United States.

19 Mr. Taylor is not here. I guess you're handling
20 the forfeiture, Mr. Savage?

21 MR. SAVAGE: Yes, Your Honor. I will do my best.

22 THE COURT: All right.

23 All right. Mr. Litteral, will you please stand.

24 Sir, do you recall appearing before Magistrate
25 Judge David Cayer on December 18th of last year for the

1 purpose of entering three pleas of guilty?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And do you remember being put under
4 oath at that time?

5 THE DEFENDANT: Yes, sir, I do.

6 THE COURT: And do you remember answering a series
7 of questions of Judge Cayer?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Were all of your answers to all of his
10 questions true and correct?

11 THE DEFENDANT: Yes, sir, they was.

12 THE COURT: If I were to ask you those same
13 questions again today, would your answers be the same?

14 THE DEFENDANT: Absolutely.

15 THE COURT: And on that day you were asked to
16 review a document, an electronic document known as the
17 Acceptance of Plea Form. On that document is listed all the
18 questions that you're asked during the course of the hearing.
19 As you answer each question, the magistrate judge checks off
20 your answer. At the end of the hearing you're asked to
21 review the document to make sure it's correctly filled out
22 and you're asked to sign it.

23 Did you review and sign that document?

24 THE DEFENDANT: Yes, I did, sir.

25 THE COURT: All right. Thank you, sir.

1 Mr. Davis, were you present at that Rule 11
2 hearing?

3 MR. DAVIS: I was, Your Honor.

4 THE COURT: Do you believe Mr. Litteral fully
5 understood Judge Cayer's questions?

6 MR. DAVIS: I do.

7 THE COURT: Thank you.

8 Mr. Litteral, one last question, and it's the most
9 important question that I will ask you today. On December 18
10 of last year, you admitted to Judge David Cayer you were
11 guilty of three federal felonies. The first of those,
12 Count One, was conspiracy to defraud the United States in
13 violation of Title 18, United States Code, Section 371. The
14 second of those was Count Two of the bill of indictment,
15 knowingly make -- knowingly making false -- a false statement
16 during the attempted purchase of a firearm in violation of
17 Title 18, U.S. Code, Section 922(a)(6) and Title 18, U.S.
18 Code, Section 924(a)(2). And thirdly, Count Three, aiding
19 and abetting possession of ammunition by a prohibited person
20 in violation of Title 18 U.S. Code Section 922(g), Title 18,
21 United States Code, Section 924(a)(2), and Title 18, U.S.
22 Code, Section 2.

23 Now, I ask you again this morning are you, in fact,
24 guilty of those three federal felonies?

25 THE DEFENDANT: Yes, sir, I am.

1 THE COURT: All right. Thank you, sir.

2 Based upon those representations and the answers
3 given by the defendant at the Rule 11 hearing before
4 Judge Cayer, the Court affirms Judge Cayer's findings that
5 defendant's pleas were knowingly and voluntarily made and
6 that defendant fully understood the charges, the potential
7 penalties and consequences of his three pleas of guilty.
8 Accordingly, the Court affirms the magistrate judge's
9 acceptance of defendant's plea of guilty at the Rule 11
10 hearing.

11 Now, separate from and independent of the
12 magistrate judge, this Court has reviewed the entire record
13 in this case, including the Rule 11 colloquy, and this Court
14 also finds as a matter of fact that the defendant's plea was
15 knowingly and voluntarily made and that defendant fully
16 understood the charges, potential penalties and consequences
17 of his three pleas. Accordingly, the Court accepts the
18 defendant's pleas of guilty and the Court hereby adjudicates
19 the defendant guilty of the three felonies.

20 Now, the parties have entered into a written
21 factual basis. I do note that three paragraphs of that
22 factual basis -- excuse me. Paragraph 22 includes three
23 subparagraphs of that factual basis is objected to by the
24 defense. But as to the rest of the factual basis, which the
25 parties agree to, there is a -- the magistrate found there

1 was a sufficient factual basis for the entry of the three
2 pleas. This Court affirms the magistrate's finding. This
3 Court also independently finds there's a sufficient factual
4 basis for the entry of the three pleas of guilty.

5 Now, sir, after you entered your three pleas of
6 guilty, your case was referred to the United States Probation
7 Office for a presentence investigation report. I'm holding a
8 copy of that report.

9 Have you received a copy of this report?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Have you read it?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Have you -- do you understand it?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Have you had an opportunity to go over
16 the report with Mr. Davis?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And has he answered any and all
19 questions you had regarding the report?

20 THE DEFENDANT: Yes, sir, he has.

21 THE COURT: All right. Thank you.

22 I do note there are objections to the report. The
23 one that directly affects the guidelines calculation is the
24 leadership enhancement, but I -- we will -- we will proceed
25 with going through the objections one by one.

1 Mr. Davis, you can start with whichever -- whatever
2 objection you want to start with.

3 MR. DAVIS: Thank you, Your Honor. I think there
4 are two that directly affect the guidelines. One would be
5 the base offense level.

6 THE COURT: Right.

7 As to whether the semiautomatic was --

8 MR. DAVIS: Correct.

9 THE COURT: -- was in close proximity to the
10 magazine.

11 MR. DAVIS: Correct, Your Honor. And then the
12 other one would be the aggravated role objection on that.
13 And I think that is where I would like to focus the Court's
14 attention.

15 I believe that Mr. Savage has some evidence he
16 wants to put on regarding the base level. So I'll defer to
17 the Court as to how the Court wants to proceed --

18 THE COURT: Well --

19 MR. DAVIS: -- procedurally in that regard.

20 THE COURT: The Government does have the burden of
21 proof on both the issues because they are coming from the
22 probation office. So why -- if the Government has evidence,
23 then let's have the Government present its evidence first,
24 and then we can hear argument on -- on those two issues.

25 MR. DAVIS: That makes sense to me as well, Your

MOSS - DIRECT

1 Honor.

2 THE COURT: Mr. Savage.

3 MR. SAVAGE: The United States would call Special
4 Agent Mark Moss to testify.

5 MARK MOSS, GOVERNMENT'S WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. SAVAGE:

8 Q. Would you please state your name.

9 A. Mark Moss.

10 Q. And, Mr. Moss, how are you employed?

11 A. By the Federal Bureau of Investigation.

12 Q. And how long have you been an agent with the Federal
13 Bureau of Investigation?

14 A. A little more than 20 years.

15 Q. Okay. And could you tell the Court a little bit about
16 your experience and background prior to coming into the FBI?

17 A. Prior to coming into the FBI, I was an Army officer
18 active duty after college. After completing that military
19 obligation, I went in to a law enforcement -- I was a police
20 officer in Virginia for a few years. Then I entered into the
21 FBI.

22 Q. And in the course of your FBI training, did you become
23 familiar with various types of firearms?

24 A. Yes, sir. I am a weapons instructor for the FBI for
25 over 19 years.

MOSS - DIRECT

1 Q. And let me direct your attention to 2015. Did you -- in
2 fact, on July 17th of last year. Were you participating in
3 an investigation involving the defendant in this case, Walter
4 Eugene Litteral?

5 A. Yes, sir, I was.

6 Q. And could you tell the Court what happened specifically
7 on July 17, 2015, at the Gander Mountain store in Gastonia,
8 North Carolina?

9 A. Yes, sir. I was prepositioned in the store along with
10 Special Agent Brian Ropey, and we were to monitor
11 Mr. Litteral as he came into the store and see what activity
12 happened. While in the store, we -- we witnessed
13 Mr. Litteral come into the store, go to the back of the
14 store, and discuss something with one of the employees of
15 Gander Mountain. A short time lawyer, an employee brought
16 out a box that said Smith & Wesson on it, and Mr. Litteral
17 examined the contents of the box, which it to be an
18 AR-15-type rifle. Additionally, I noticed that he examined
19 the magazine that was in the box along with the rifle.

20 A short period of time after that, he moved to a
21 different part of the store, looked like maybe some paperwork
22 going on. He remained in that area for approximately 30
23 minutes and then he departed the store without the rifle.

24 Q. Okay. Is the person that you saw in the Gander Mountain
25 store on the 17th of July 2015 present in the courtroom

MOSS - DIRECT

1 today?

2 A. Yes, sir, he is.

3 Q. Would you please point to him and call him by name?

4 A. He's right here to you -- to my left in the orange
5 shirt.

6 MR. SAVAGE: Your Honor, would the record reflect
7 that correct identification of the defendant.

8 THE COURT: So reflected.

9 Q. Now, Agent Moss, did you have a clear view of the
10 defendant the entire time he was in the Gander Mountain
11 store?

12 A. For the most part. I didn't get extremely close to him,
13 but I could see him the entire time he's in the store, except
14 for momentarily when he was moving in between some
15 merchandise.

16 MR. SAVAGE: Your Honor, may I approach?

17 THE COURT: You may.

18 Q. Agent Moss, let me show you what I marked as
19 Government's Exhibit 1. Do you recognize this -- this box?

20 A. Yes, sir. This is the box that contained the weapon
21 that was in the Gander Mountain store.

22 Q. Okay. And the same one that you saw the defendant
23 looking at?

24 A. Yes, sir, it is.

25 Q. Okay. How close was the defendant to this box?

MOSS - DIRECT

1 A. He -- he was with the box in examining the rifle right
2 with it. He was basically on top of the box.

3 Q. Did he pick up the weapon and handle it?

4 A. Yes, sir.

5 MR. SAVAGE: And I'm opening the box, Your Honor,
6 and I would note that the weapon inside of it has been
7 disabled or has the appropriate safety straps on it.

8 Q. Could you -- could you pick up the weapon?

9 A. Yes, sir.

10 Q. And show us, if you can, the way that the defendant was
11 holding it.

12 A. Something to the effect like I am now. He was examining
13 the rifle.

14 Q. If you could show the Court.

15 A. (The witness complied.)

16 Q. Now, is there other items inside this box besides just
17 that weapon?

18 A. Yes, sir.

19 THE COURT: Could you verbally described how you
20 just held it for the record.

21 THE WITNESS: Two-handed, kind of a -- almost like
22 a port arms military. He was just examining the weapon.

23 THE COURT: Right. I think port arms is a good
24 description. So you can go back to Mr. Savage's question.

25

MOSS - DIRECT

1 Q. Did he pick up any other items in the box?

2 A. Yes, sir. There was a magazine he examined in the box.

3 Q. Okay. And could you pick that up and show the Court?

4 A. (The witness complied.)

5 Q. Now, you were -- how far away were you standing from the
6 defendant at the time that he was looking at this box?

7 A. I moved a little bit. So I would say it varied, you
8 know, 10, 15 yards, somewhere in there maybe. But I didn't
9 get too close or too far.

10 Q. Okay. Well, how could -- could you tell that the item
11 in the box that he was holding besides the rifle was a
12 magazine?

13 A. Well, yes, sir. The reason I know this is not only my
14 training with the FBI, but I'm a gun enthusiast in my private
15 time. These particular magazines are the ones that I
16 purchase personally. They're very distinctive, and I do
17 recall when I saw him picking it up, I was unaware that Smith
18 & Wesson included that brand of magazine with their guns.
19 Usually they incorporated an inexpensive metal GI-type
20 magazine. And I was rather impressed that Smith & Wesson
21 included a high-quality magazine by Magpul in with the gun.
22 So me being the enthusiast, I took note of that.

23 Q. Okay.

24 THE COURT: It was in that plastic bag though?

25 THE WITNESS: Yes, sir.

MOSS - DIRECT

1 THE COURT: But you could -- it's clear on this
2 side, so you could see -- you knew it was --

3 THE WITNESS: Yes, sir.

4 THE COURT: You knew it was a magazine?

5 THE WITNESS: Yes, sir. It's a distinctive
6 packaging. Like I said, I'm very familiar with it from my
7 personal experience, but it's also one of three magazines
8 that the FBI allows for its weapons. So I'm at work and
9 personally experienced with.

10 Q. If you could just tell the Court for the record, what
11 does it say on the label? What kind of magazine is that?

12 A. It's manufactured by a company called Magpul, and it's
13 called a P Mag. It's a plastic polymer-based magazine, 30
14 rounds. It says AR M4 generation M2.

15 Q. Okay. And this is important for the record. So this
16 magazine, in your experience, will contain at least 30 rounds
17 of ammunition?

18 A. Yes, sir. It's designed to function with 30 rounds of
19 ammunition.

20 THE COURT: And interchangeable between an AR-15,
21 which is a semiautomatic, and M4 which is burst, correct?

22 THE WITNESS: Correct. The M4 has a selector
23 switch to allows it go fully automatic. But essentially they
24 are the same rifle except for that fact, for the most part.
25 And this is -- this magazine will function in this AR-15-type

MOSS - CROSS

1 rifle or M4 rifle, yes, sir.

2 MR. SAVAGE: Thank you. You may be seated.

3 Q. Now, after the defendant examined the box, what happened
4 next?

5 A. He moved to a different part of the store with the
6 employee. It appeared like they were doing some paperwork of
7 some kind. He remained in that area for quite some time,
8 almost a half an hour.

9 Q. Okay.

10 A. And then he departed the store without the rifle.

11 Q. To be clear, the rifle stayed. It was put back in the
12 box and taken back behind the counter?

13 A. Yes, sir.

14 Q. Thank you.

15 MR. SAVAGE: No further questions, Your Honor.

16 THE COURT: Mr. Davis, your witness.

17 CROSS-EXAMINATION

18 BY MR. DAVIS:

19 Q. Agent Moss, when Mr. Litteral went to the other part of
20 the store, as you described after examining the rifle, how
21 far away was that from the counter where he had been?

22 A. I don't know, sir. Maybe 10 to 15 yards or so. It's
23 not real far.

24 Q. And you were watching him during that time?

25 A. Yes, sir.

MOSS - CROSS

1 Q. Were you watching the rifle on the counter?

2 A. I did not watch the rifle on the counter the whole time.
3 I was watching him. It remained back at the counter.

4 Q. All right. And you did not see what the clerks were
5 doing with that box?

6 A. I saw them put it back behind the counter, but what they
7 did with it, I don't know.

8 Q. And when was the next time you saw that rifle?

9 A. The next time I saw the rifle was in the evidence locker
10 of our building.

11 Q. And how long after -- after your surveillance was that?

12 A. It was several days after I saw the rifle. I -- I was
13 not the one that collected the rifle in evidence.

14 Q. And you said Mr. Litteral filled out paperwork after he
15 had left the counter?

16 A. It's what it appeared, yes, sir.

17 Q. Did you see him fill out any paperwork while he was with
18 the rifle?

19 A. I did not notice that.

20 Q. Did you ever have occasion to interview the clerks who
21 showed him the rifle?

22 A. I did not.

23 Q. So you do not know what they said to him?

24 A. I do not.

25 Q. You do not know what he said to them?

MOSS - CROSS

1 A. I do not.

2 Q. And you don't know what they may have discussed about
3 that magazine being included or not included?

4 A. I do not.

5 Q. To your knowledge, Mr. Litteral never actually completed
6 the purchase of that rifle?

7 A. To my knowledge.

8 Q. Now, Agent Moss, you also filled out a report regarding
9 the surveillance, correct?

10 A. Yes, sir, I did.

11 Q. Okay. And do you recall saying in that report that he
12 was observed handling magazines, plural?

13 A. Yes, sir.

14 Q. Are there more than one magazine in that box?

15 A. No, sir.

16 Q. So were there other magazines around when he was looking
17 at the rifle?

18 A. I don't know. The magazine was put up and down, and
19 from my vantage point I couldn't tell if it was the same
20 magazine or not.

21 Q. All right.

22 A. It might -- it's possible that it was only one magazine.

23 Q. And it's possible that there were multiple magazines
24 there?

25 A. Possible.

MOSS - CROSS

1 Q. At that time did you actually look at the magazine in
2 the box?

3 A. Only from the vantage point I was. I didn't want to get
4 very close.

5 Q. So only when it was in Mr. Litteral's hand?

6 A. Yes, sir.

7 MR. DAVIS: Nothing further.

8 THE COURT: Redirect?

9 MR. SAVAGE: Nothing from the Government, Your
10 Honor.

11 THE COURT: All right. Special Agent Moss, you may
12 step down.

13 Further evidence from the United States?

14 MR. SAVAGE: Not on the first objection, Your
15 Honor. Do you want us to proceed to the second or?

16 THE COURT: No. Let's deal with them one by one.

17 MR. SAVAGE: Okay.

18 THE COURT: Any defense evidence on this issue?

19 MR. DAVIS: No, Your Honor.

20 THE COURT: All right. Then it's defense's
21 argument.

22 MR. DAVIS: Thank you, Your Honor.

23 The question, of course, is whether this is a
24 high-capacity magazine based on whether at the time of the
25 offense it was in sufficient proximity to a -- to a magazine

1 capable of carrying other rounds.

2 The offense in this particular case is the filling
3 out of the forms where Mr. Litteral was, by Agent Moss's
4 testimony, not near the rifle. It was not in his possession.
5 By Agent Moss's testimony, we don't know exactly what
6 happened to the rifle after the clerks took it and put it
7 under the -- under the counter. It doesn't sound like he
8 even particularly observed that terribly closely. So we
9 don't actually know --

10 THE COURT: Do we need -- do we need -- do you need
11 an exact chain of custody, or can you just use the
12 circumstantial evidence of the -- he actually, you know,
13 observed by two federal agents holding this magazine next to
14 the AR-15? I mean, that's what I'm saying. Does it have to
15 be a perfect chain of custody, or can it be a chain of -- can
16 it just be a circumstantial chain of custody?

17 MR. DAVIS: Well, I guess if the Court is asking
18 what is the burden of proof particularly in regards to
19 this --

20 THE COURT: Well, it's preponderance of the
21 evidence.

22 MR. DAVIS: Right, exactly. And so I think that to
23 that extent the Court can make that decision based on the
24 evidence presented. That said, I do think the Government has
25 to produce evidence that at the time of the actual offense

1 this is -- this is what was happening.

2 What I would submit to the Court is this rifle
3 never -- other than the brief moment of his examination, was
4 never actually in Mr. Litteral's possession. It certainly
5 was not in his possession at the time he committed the
6 offense, which would be filling out paperwork in this case.
7 It was in the possession of Gander Mountain. We don't have
8 evidence of what Gander Mountain did or didn't do. We don't
9 know if Gander Mountain put these -- stored these things
10 separately. We don't know. From what Agent Moss said, he
11 couldn't tell exactly how many -- how many clips are going up
12 and down --

13 THE COURT: Why -- why are you narrowly saying the
14 offense is just knowingly making false statements? Isn't it
15 all three counts grouped under the guidelines?

16 MR. DAVIS: They would group, that's correct, Your
17 Honor.

18 THE COURT: Right. So the conspiracy is ongoing,
19 and -- and the making of false statement wouldn't -- wouldn't
20 it include the events around the making of a false statement?

21 And finally, aiding and abetting the possession of
22 ammunition by a prohibited person, that's -- that's an
23 ongoing crime here, aiding and abetting, right?

24 MR. DAVIS: Well, I would submit to Your Honor that
25 at least -- certainly the aiding and abetting I think is the

1 clearest aspect of this because there's no question that
2 Mr. Litteral did not have, you know, any -- any ability, any
3 control, anything near the rifle at the time of the aiding
4 and abetting of Mr. Barker's purchase.

5 THE COURT: But it is aiding and abetting. I mean,
6 the aiding and abetting doesn't mean you have to be standing
7 right there. You can do anything to aid and abet. And if
8 you do aid and abet, then you become a principal.

9 MR. DAVIS: Yes, but Mr. -- but Mr. Barker's
10 possession of ammunition was not until days after this
11 occurred. I think in that particular regard.

12 THE COURT: Well, you're right. Yes, I agree with
13 you there. The -- specifically the ammo.

14 MR. DAVIS: Right. And in regards to the
15 conspiracy, Your Honor, as we've argued to the extent that
16 the question is -- the issue is that would Mr. Litteral have
17 ultimately turned over this -- this gun and clip to
18 Mr. Barker. At first I do think there's a legitimate
19 question about whether that actually would have occurred, but
20 certainly I think he contemplated that it would, that it was
21 a conditional contemplation. But at the time Mr. Litteral
22 believed that those conditions would come to pass, even
23 though in reality they wouldn't.

24 However, the acts to complete Mr. Barker's
25 possession had not come to pass. And so to the extent that

1 there's a conspiracy theory liability under 2S1.1 I believe
2 that it's not complete -- sufficiently completed to merit the
3 adjustment. Or rather, I should say, it would therefore
4 merit a three-level reduction under the conspiracy guideline.

5 THE COURT: But the conspiracy in this case, the
6 object of this conspiracy was aiding and abetting with a
7 false statement and the possession of ammunition by a
8 prohibited person. So don't you use 2K2.1 in that case, and
9 371 is -- fall -- 371 violation, a continuing violation based
10 on just an agreement. Don't you apply 2K2.1, not the 2X
11 series?

12 MR. DAVIS: You do to the extent that the crime is
13 completed. Our argument is if you look -- if you're
14 talking -- if you're discussing the crime of making false
15 statement, during that crime there's not -- there is no
16 possession of firearm. There's no possession of the clip.
17 The physical proximity, our argument is, the physical
18 proximity required for this increase requires some degree of
19 Mr. Litteral's possession and control over the weapon at the
20 time of the offense. To the extent we're talking about the
21 offense --

22 THE COURT: See, I think what I'm saying is you
23 keep looking at one offense, the making of the false
24 statement. And I keep looking at the conspiracy, which is
25 ongoing, and it involved every step, substantial step forward

1 or every overt act, and those overt acts are laid out in the
2 indictment.

3 MR. DAVIS: Yes, Your Honor. My argument on that
4 point is to the extent that we are -- the object of the
5 conspiracy is the false statement, I don't believe the
6 conspiracy liability or the time frame for the conspiracy
7 itself can exceed the actual crime itself. In this
8 particular case --

9 THE COURT: Which crime are you -- which object are
10 you talking about? Actually --

11 MR. DAVIS: If it's -- if it's the false statement.

12 THE COURT: Well, I disagree with you as a matter
13 of law on that one. You can -- you can have a substantive
14 crime and it's an overt act in conspiracy, and you can have
15 the conspiracy continuing with a lot more overt acts.

16 MR. DAVIS: That's correct. That is definitely
17 true, Your Honor.

18 THE COURT: All right.

19 MR. DAVIS: But to the extent that we're talking
20 about the conspiracy continuing to other objectives beyond
21 that, those objectives were not completed.

22 THE COURT: But they don't -- but conspiracy, you
23 just need agreement. You don't have to complete any
24 objective. You just have to have the agreement and an overt
25 act. You don't have to have an -- objectives are unnecessary

1 as a matter of law. You just -- the agreement and overt act
2 under 371.

3 In some conspiracies, not applicable here, but
4 other conspiracies don't require an overt act. But everyone
5 agrees that 371 requires an overt act.

6 MR. DAVIS: I think for the purposes of 2K2.1
7 enhancement here, the fact that a firearm -- if -- if, at the
8 moment of agreement, that is the question of proximity is at
9 the moment of agreement in proximity --

10 THE COURT: I don't -- I don't -- what's your case
11 law saying that you take a whole conspiracy that takes a lot
12 of overt -- that intends to have a lot of overt acts and you
13 narrow it down to one overt that's tied specifically to one
14 substantive crime? You have -- you have any case law that
15 supports that?

16 MR. DAVIS: There is virtually no case law on this
17 enhancement in this context, Your Honor. So, no, I do not.
18 But I --

19 THE COURT: Well, no, I'm not talking about -- I'm
20 not talking about this set of facts. I'm saying period.
21 That say you have four objects of a conspiracy and each of
22 those is a separate substantive crime, it seems to me you're
23 saying that you break a conspiracy up into four little
24 conspiracies, each tied specifically to a -- the -- each of
25 those objects each as a substantive crime. That sounds like

1 what you're doing here. Instead of saying that a conspiracy,
2 just as long as there's agreement, it keeps going. And --
3 and unless you affirmatively withdraw, once you're in you're
4 in.

5 MR. DAVIS: Yes, Your Honor. And I -- my point is,
6 I don't think that it is a fair application of 2K2.1 to say
7 that because though you could not have -- that you would not
8 receive this enhancement at the time of the crime that is
9 point of conspiracy A and you have not completed the point of
10 conspiracy B, you can be enhanced while not receiving the
11 reduction. You can be enhanced under the guideline section
12 that applies to the first crime while not receiving the
13 reduction for the second.

14 So I think either the conspiracy law has to look at
15 the actual crime that is being enhanced, which would be the
16 false statement crime, and fall under the same rules as that,
17 or it has to look at the entirety of the conspiracy in which
18 case it was not completed and, therefore, there's a
19 reduction.

20 THE COURT: Well, he -- he did not plead guilty
21 to -- well, I'm sorry.

22 Well, he -- one -- one of the objects of
23 conspiracy, of course, is the 922(a)(6), the -- making the
24 false statement. And, I mean, I guess I'm not following what
25 you're saying because I'm looking at conspiracy as it's

1 ongoing, and you're saying that you have to look narrowly at
2 one overt act because if you used the 2X series, then you
3 would have a reduction because it's a conspiracy. Right? A
4 two- or three-level -- what is it? Three levels?

5 MR. DAVIS: Three-level reduction.

6 THE COURT: But -- but doesn't that then just make
7 a nullity out of the close proximity issue, and you just kind
8 of preliminarily eliminated it? And how do you eliminate
9 something that is very specific? Close proximity of the
10 magazine to the rifle.

11 MR. DAVIS: Well, I think I -- I think -- allow me
12 to try and simplify it a different way, Your Honor.

13 Under -- under the 922(a)(6) conviction, there's --
14 the question I think before the Court is, was this in close
15 proximity at the time of the commission of that offense. So
16 was it for purposes of the guidelines.

17 If the answer to that question is "yes," then, of
18 course, that's the end of the debate. If the answer to that
19 question is "no," then the question is, would the conspiracy
20 scoop it in.

21 And my argument to the Court is the fact that a
22 conspiracy is ongoing to a different objective could,
23 therefore, cause you to enhance one part of the conspiracy
24 that can't be enhanced independently of that. You can't
25 basically scoop in that enhancement. You would miss under

1 the conduct, that's the conduct that that's object of the
2 conspiracy, and slap it on to conduct that otherwise wouldn't
3 be subject to that enhancement because when that -- that
4 second conduct was not completed.

5 You basically can't add that back on when it
6 wouldn't be on (a) (6) itself unless you looked to the
7 additional goals of the conspiracy. And if you looked to
8 those, you have to say those weren't completed and reduce it
9 by three levels.

10 That's our argument.

11 THE COURT: All right. I -- I don't recall you
12 ever citing any case law -- right? -- on this issue.

13 MR. DAVIS: As I said to the Court before, I don't
14 believe there's any particular case law.

15 THE COURT: All right.

16 MR. DAVIS: We did cite to case law regarding --
17 regarding the 2X reduction and that aspect of things. I
18 assume that's not what the Court is referring to.

19 THE COURT: No.

20 MR. DAVIS: I can elaborate further on it. There's
21 certainly case law.

22 THE COURT: All right.

23 Mr. Savage.

24 MR. SAVAGE: Your Honor, to clarify. And this
25 logic is completely circular. In Document No. 44 in

1 Government's response to the defendant's objection --

2 THE COURT: I have that.

3 MR. SAVAGE: -- if you go to page -- actually,
4 well, our response starts on -- the applicable law starts on
5 3, but it lays out the applicable guideline provisions. The
6 Court has it exactly right. I mean, the defendant wants to
7 plead guilty to one -- wants you to sentence him on one count
8 and he pled guilty to three. The Government didn't include
9 and didn't insist on that conspiracy count for no reason at
10 all. But for the intervention of the FBI that prevented this
11 gun from being delivered because it would not give the
12 completion on the background check the defendant would have
13 -- would have purchased this gun. The object of the offense
14 was him to purchase it for Mr. Barker. He would have
15 delivered it to Mr. Barker, which is the object of the straw
16 purchase because he didn't purchase it himself.

17 The guideline that applies, this business about you
18 can't have it and slap it and take it back is ridiculous. I
19 mean, the fact of the matter is it's a conspiracy. Under
20 2X1.1, you go to the base level. It cross-references to the
21 underlying offense. You pick up the underlying offense and
22 it's specific offense characteristics.

23 So you go to 2K2.1. You look and see that this guy
24 is buying a mag -- that -- he knows that Mr. Barker is a
25 convicted felon because he tells his friend. He also knows

1 he's an addicted -- he's addicted to Oxycodone because he's
2 selling it to him. He says that in his confession. He knows
3 it's an AR-15 because he picks it up. He helps pick it out.
4 Mr. Barker gives him \$700 to buy it ahead of time. He knows
5 it has a magazine in it because he picks it up.

6 More than that, shown on Exhibit 1, the Smith &
7 Wesson, when you go to buy this particular gun it says in its
8 description that it includes a 30-round P Mag magazine with
9 it, which is part of the Government's -- I marked this as
10 Government's Exhibit 2, but it's Attachment No. 1 to our
11 Document 44, which is our response.

12 So all of that occurred. The fact that it wasn't
13 actually delivered, you then get to the specific offense
14 characteristics. And the defense objection, their alternate
15 argument is, Okay, because the offense wasn't completed, you
16 need to give him three levels, which is I think what the
17 argument is here. However, if you look at the --

18 THE COURT: The three-level reduction?

19 MR. SAVAGE: Right.

20 THE COURT: Right.

21 MR. SAVAGE: But if you look at the background note
22 to 2S1.1 and that application of that 2S1.1(b)(2), it says,
23 In most prosecutions for conspiracy, the substance offense
24 was substantially completed or was interrupted or prevented
25 on the verge of completion by the intercession of law

1 enforcement authorities or the victim. In such case, no
2 reduction of the offense level is warranted.

3 The only reason this conspiracy wasn't completed
4 was because the FBI had a wire up, knew he was in the place,
5 was following him and didn't let him buy the gun. Otherwise,
6 the entire thing would have been completed. It would have
7 been delivered to Mr. Barker.

8 And that, by the way, if Mr. Davis is arguing that
9 it wasn't Mr. Litteral's intent to actually deliver it, then
10 we've got a problem with acceptance of responsibility and
11 wonder why it is that he pled guilty to these offenses.
12 Because if you look at the plea -- if you look at the factual
13 basis in the plea agreement, it is clear that if you look in
14 paragraph 13(c) of the factual basis, it says, quote,
15 Litteral knew and intended that his offense of making a false
16 statement to purchase a firearm for Barker would result in
17 the transfer of a firearm to a prohibited person.

18 That was the whole purpose of this conspiracy, is
19 to arm these people because of Jade Helm and Armageddon and
20 the president was coming to take their guns.

21 THE COURT: And that -- Jade Helm is the name of
22 the operation, right?

23 MR. SAVAGE: Yes, that was happening not in
24 North Carolina, but 1,000 miles away in Texas at the same
25 time. But which is, as the Court might be aware, the subject

1 of all sorts of conspiracy theories on the internet, and that
2 sort of thing about which Mr. Barker --

3 THE COURT: Just note for the record, the Court is
4 not aware of that.

5 MR. SAVAGE: I'm sorry.

6 THE COURT: Seriously. The Court did not Google
7 Jade Helm.

8 MR. SAVAGE: Okay.

9 THE COURT: That would probably be inappropriate
10 for a finder of fact --

11 MR. SAVAGE: Right.

12 THE COURT: -- to be looking at the evidence
13 outside the courtroom.

14 MR. SAVAGE: Well, outside. Inside the parameters
15 of this, the filed -- the filed pleadings in this case make
16 it clear that Jade Helm was the object of the eye of
17 Mr. Barker, Mr. Campbell and Mr. Litteral, who were all
18 gathered together to try to arm themselves when this event
19 occurred.

20 So for all these reasons, when we're looking at
21 this particular objection, Your Honor, we would rely on the
22 factual resume, the notes, the comments I just mentioned,
23 2S1.1, the fact that the defendant pled guilty to a
24 conspiracy. At the time of the conspiracy, which by the way,
25 is alleged in the indictment as including the 17th in the

1 factual resume, the admissions include the 17th. The
2 indictment alleges that the conspiracy begins I think on
3 March 1st.

4 Let me go to Count One.

5 It alleges that it begins on March 1st, 2015, and
6 continues until at least on or about August 1st, 2015.
7 August 1st, 2015, was the date that we executed the search
8 warrants and the arrest. The time of the offense includes
9 that entire time as the conspiracy was in operation. The
10 defendant never withdrew, never repudiated, never said he
11 wasn't going to give the gun.

12 In fact, that same day he talks to Mr. Barker on
13 the telephone in an intercepted conversation and gives him
14 advice on what other kinds of magazines to buy. And
15 Mr. Barker, to complete his part of the conspiracy, actually
16 buys ammunition, which the defendant has pled guilty to
17 aiding and abetting because he knows he's an addicted person
18 and he knows he's a felon.

19 So for all those reasons, it is clear that at the
20 time of the offense, which was the 17th of July 2015, he
21 possessed and had in his possession and control this Smith &
22 Wesson MP-15 with the 13- -- 30-round magazine that comes
23 with it. If he didn't, he certainly intended for Mr. Barker
24 to possess it. And at the end of the day, it would be -- it
25 would be ludicrous to have a MP-15 to defend against the

1 coming of the marshal law without the -- either the magazine
2 that comes with the gun or the magazine that Mr. Barker and
3 aided and abetted by Mr. Litteral was purchasing at the
4 Gander Mountain later that day.

5 THE COURT: Quick question. Definition of the
6 semiautomatic firearm. I know the Government is proceeding
7 on the in close proximity. Are you proceeding on the
8 alternative that the firearm had attached to it a magazine or
9 similar device?

10 MR. SAVAGE: I have no evidence, Your Honor, that
11 at any other time that the magazine would have been attached.

12 Clearly --

13 THE COURT: It's reasonable to presume sometime it
14 was attached, but you don't have any direct evidence of that.

15 MR. SAVAGE: No. Your Honor, I think that the
16 clear -- by a preponderance I think this Court would
17 certainly be legitimate in finding based on all the facts and
18 circumstances surrounding around this conspiracy that it was
19 the intent of the parties that at some point in time it be
20 attached because they intended to use it. I mean, a gun is
21 worthless without bullets. So, I mean, I don't think they
22 were going to club people with it.

23 THE COURT: Well, actually some guns are designed
24 that way.

25 MR. SAVAGE: Well, that's true.

1 THE COURT: You run out of ammo, you turn it into a
2 clubbing device.

3 MR. SAVAGE: Well, there was no indication that
4 they wanted a MP-15 because it made a good baseball bat.

5 THE COURT: No. These weapons are usually not
6 designed that way.

7 MR. SAVAGE: Right. Otherwise, Mr. Barker wouldn't
8 have been doing his own shopping for ammunition. He bought
9 100 rounds and he bought another magazine to fit this gun.
10 So it had two.

11 THE COURT: Actually, I take that back. The old
12 M16s, which, of course, the AR-15s are designed after, did
13 have bayonets. They were designed for purposes beyond --
14 when you ran out of ammo, you had a bayonet.

15 MR. SAVAGE: Having no experience on that, Your
16 Honor, I'd certainly defer to the Court on that one. So --

17 THE COURT: So anyway, that's not an issue today.
18 It's the question of the proximity of the magazine. All
19 right.

20 One minute of rebuttal.

21 MR. DAVIS: Yeah. One minute and one minute only,
22 Your Honor.

23 Two very quick things. First of all, I think that
24 the Court will see that the evidence is that Mr. Barker did
25 not want this gun to prepare for Jade Helm and that is not a

1 correct statement of the evidence.

2 Second of all, to the extent it is relevant to the
3 Court's analysis in this particular objection, there is clear
4 case law that this would not -- that the fact that -- whether
5 or not Mr. Litteral actually intended to at some point give
6 this to Mr. Barker, not enough steps had been completed to do
7 that under 2S1.1.

8 THE COURT: Then why did he plead to conspiracy?

9 MR. DAVIS: Well, no, no. It's not the conspiracy
10 plea. The conspiracy itself is completed.

11 THE COURT: All right.

12 MR. DAVIS: The question is under the -- for the
13 three-level reduction under 2X1.1, and there is a case, *U.S.*
14 *v. Soto*, which is cited in our brief. It's an Eighth Circuit
15 which is very on point. The defendant there was stopped with
16 a large amount of ammunition in his trunk. He told the
17 authorities he was taking it or he intended to take it to
18 someone he called Compadre, who would then smuggle it across
19 the border. He just wasn't on his way to do it at that
20 particular moment.

21 And the Eighth Circuit found that is not sufficient
22 to say that they interrupted it right before it was completed
23 because there was still a number of intervening acts that he
24 would have had to perform in order to get that ammunition to
25 Compadre. They had no evidence that he was going to

1 immediately deliver it to Compadre.

2 THE COURT: Except that's not the facts here.
3 The -- he actually was going to purchase it until the FBI,
4 NICS said no. So --

5 MR. DAVIS: And --

6 THE COURT: So he was up to the point of the
7 purchase, and it was stopped by the FBI because they have a
8 national system for checking it.

9 MR. DAVIS: And --

10 THE COURT: So it was to the point where everything
11 was done. Otherwise, you wouldn't have sent it off to the
12 FBI.

13 MR. DAVIS: In terms of the purchase, Your Honor is
14 correct. In terms of delivery to Mr. Barker to the extent
15 that as part of this Court's analysis, I don't think that
16 that's correct. I think that that is actually very
17 analogous. The evidence here is that he was going to go
18 straight home after he purchased the firearm.

19 So to the extent that the actual getting it into
20 Mr. Barker's hands as a part of the analysis here, the intent
21 to do that in *Soto* would apply.

22 THE COURT: Well, isn't the -- just the intent is
23 all you need, right? That the intending to turn it over?

24 MR. DAVIS: Well, under 2X1.1 that's not correct,
25 Your Honor. Under 2X1.1 the three-level reduction applies if

1 you have not completed all of the necessary steps, except
2 when the Government intervenes on the verge of doing so.

3 THE COURT: Right.

4 MR. DAVIS: So to the extent what we're talking
5 about is the delivery to Mr. Barker, there is zero evidence
6 that Mr. Litteral had any actual active plans to put it in
7 Mr. Barker's hands.

8 Now, the intent that ultimately -- whether it was
9 before or after bad things happened, whether Mr. Litteral
10 would store it in his gun safe for Mr. Barker or not, he
11 absolutely has admitted to that. But what is absent is the
12 same thing that was absent in *Soto*. The actual active act of
13 plans to go and deliver this to Mr. Barker. It didn't have
14 that. They had made no such plans. It was -- it's clear
15 that Mr. Litteral's plan was that he was going to go back to
16 his house. There was discussion of storing it.

17 THE COURT: But --

18 MR. DAVIS: So to that -- to the extent that is a
19 part of the Court's analysis, then I think *Soto* is directly
20 on point.

21 THE COURT: Mr. Savage, quick response on that.

22 MR. SAVAGE: Well, Your Honor, it's a red herring.
23 I mean, the deal is he made a straw purchase. He admitted
24 it. I mean, he has it in the factual resume and he admitted
25 that he made a straw purchase. So we're looking at 2K2.1(1).

1 If the offense involved, it doesn't say it had to be
2 delivered. I mean, it's a straw purchase. The offense
3 involved a semiautomatic firearm that is capable of accepting
4 a large-capacity magazine, number one.

5 And the person was prohibited and -- and was
6 basically and is convicted under 18 U.S.C. Section 922(a)(6)
7 or 922(a)(1)(a), which is present here, and committed the
8 offense with knowledge or reason to believe the offense would
9 result in a transfer of a firearm or ammunition to a
10 criminated person. That's what he pled guilty to.

11 THE COURT: Reasonably believed.

12 MR. SAVAGE: Yeah, right. He pled guilty to this.

13 Now he wants to parse it out and say, oh, I was
14 never going to give it to him. Then why plead guilty? I
15 mean, it's actually -- now he's repudiating acceptance of
16 responsibility.

17 THE COURT: Yeah, I agree with you on that. It's
18 inconsistent with his plea.

19 MR. DAVIS: I completely disagree, Your Honor. He
20 pled guilty to the crime -- the possession of the firearm
21 here, legal possession would include ownership. We're
22 talking about physical possession by Mr. Barker. Our
23 argument is directed at physical possession. He absolutely
24 was buying the gun so that Mr. Barker would legally possess
25 it, would legally own it, and would have the ability to get

1 it in the event that this --

2 THE COURT: But --

3 MR. DAVIS: -- happened.

4 THE COURT: -- but you -- your client has admitted
5 to aiding and abetting the possession.

6 MR. DAVIS: Yes.

7 THE COURT: So that's a done crime. That is
8 100 percent completed. Without turning it over, right? Your
9 client didn't turn it over, but he admitted to the crime of
10 aiding and abetting the possession, because he did. He
11 completed the crime when he purchased the firearm with the
12 intent to -- as a strawman he aided -- he -- that crime was
13 complete because he was just an aider or abettor.

14 MR. DAVIS: Right. But that -- he pled guilty to
15 aiding and abetting possession of ammunition by Mr. Barker,
16 which would be the ammunition Mr. Barker purchased.

17 THE COURT: All right. I'm sorry. You are correct
18 about that. I'm sorry.

19 But still, that's -- that's also still -- well,
20 okay. I say that's a completed crime.

21 Let's go back to if he knowingly made a false
22 statement. That's clearly with regard to just the AR-15.

23 MR. DAVIS: Yes.

24 THE COURT: And that was completed, right?

25 MR. DAVIS: That was completed, Your Honor, yes.

1 THE COURT: Okay. So why isn't that enough to say
2 that that's a clear object of the conspiracy and that was
3 completed, right? It was beyond -- it was beyond just on the
4 verge of completion. That was completed.

5 MR. DAVIS: Yes, Your Honor.

6 Our argument is if the enhancement for the
7 high-capacity magazine is to be a part of the conspiracy
8 charge.

9 THE COURT: Right.

10 MR. DAVIS: Then that has to -- then it has to
11 necessarily be a part of the making a false statement charge
12 as well. And it would -- what the Court has heard
13 testimony-wise is not sufficient to uphold that enhancement.
14 That's the entirety of our objection.

15 THE COURT: All right. The Court overrules the
16 objection. The Court finds as a matter of fact, after
17 observing the actual weapon it's turned over from Gander
18 Mountain to the FBI, that the -- the magazine itself was in
19 the -- the box that contained the AR-15; therefore, was in
20 close proximity to the firearm as required under the
21 definition of semiautomatic firearm in commentary Application
22 Note 2 of 2K2.1.

23 It's -- it's logical what Mr. Savage was saying
24 with regard to the other alternative under the definition of
25 semiautomatic firearm, that at some point the magazine or

1 similar device that can accept more than 15 rounds of ammo
2 was attached, but I don't have any evidence, direct evidence
3 on that. We just have that it's logical they were going to
4 do that. And so I am not finding the alternative in this
5 case.

6 I am finding the magazine that could accept more
7 than 15 rounds was in close proximity to the firearm. So
8 that's paragraph 2B. The Court is sustaining the presentence
9 report on that.

10 Paragraph 2A, the Court is not finding that because
11 of the lack of direct evidence and just, you know, there
12 isn't sufficient evidence in the record in the Court's
13 opinion about the preponderance of the evidence of that
14 alternative.

15 MR. SAVAGE: Your Honor, the Government would also
16 ask for the Court to find as matter of fact and for purposes
17 of this record with respect to this whole transfer and
18 possession argument. I would note the factual findings and
19 admission in paragraph 13(c) of the factual resume in that
20 Mr. Litteral, the defendant in this case, knew and intended
21 the offense of making a false statement to purchase a firearm
22 would result, intended it would result in the transfer of the
23 firearm ammunition to a prohibited person, which in this case
24 is Mr. Barker. I mean, there's plenty of evidence on the
25 record that he wasn't simply going to just keep it in his

1 house forever. He was going to transfer it to Barker, which
2 is part and parcel of this offense. And he's also admitted
3 it in paragraph 13(c).

4 THE COURT: All right. So noted.

5 MR. SAVAGE: Thank you, Your Honor.

6 All right. That's the ruling on the first
7 objection to the guidelines calculation.

8 The second one is a role in the offense.

9 The probation office found that a two-level
10 enhancement should apply because the defendant -- the
11 defendant was an organizer or leader, manager, supervisor.

12 Mr. Davis.

13 MR. DAVIS: Yes, Your Honor.

14 First of all, I would point out that -- that in
15 sustaining or upholding that enhancement, the probation
16 office did that on the basis of saying that things were in
17 the factual basis that aren't actually in the factual basis.
18 I mean, it was in part because he directed Mr. Barker to
19 purchase ammunition, which the factual basis says they
20 discussed the purchase of ammunition, not anything -- nothing
21 about direction. And it says that in the factual basis he,
22 you know -- that basically he told Mr. Campbell how to create
23 a grenade, which in addition to not being true, is also --
24 Mr. Campbell is not even mentioned in the factual basis.

25 THE COURT: Well, is the Government limited to the

1 factual basis?

2 MR. DAVIS: The Government is not. I just wanted
3 to point out to the extent that probation's finding on that
4 carries weight, that its finding is based on facts that were
5 not actually in effect based as reported.

6 THE COURT: Right.

7 MR. DAVIS: Now, the question is what -- what would
8 sustain an enhancement here? What is there that could
9 sustain a leadership role enhancement here? In the
10 Government's response to our objections, they cited to three
11 things, which are essentially very close to what probation
12 cited. The first of those being advice about ammunition to
13 Mr. Barker. Now, even in this courtroom not that long ago,
14 Mr. Savage referred to this as "advice."

15 The Fourth Circuit requires that there be a degree
16 of authority or control. Now, the reality is that -- that
17 this mostly relates to a single conversation that Mr. Barker
18 and Mr. Litteral had. Now, that conversation does reflect
19 that there was a conversation previously. But in that,
20 Mr. Barker contacts Mr. Litteral by a text message.
21 Mr. Litteral calls him back. At that point, before that
22 conversation happened, Mr. Barker had already purchased the
23 ammunition. So it seems kind of ridiculous that -- even the
24 idea that Mr. Litteral would have advised him to go back in
25 time to purchase the ammunition.

1 Second of all, even throughout that I think it is
2 relatively clear that it is a recommendation essentially if,
3 you know -- if -- if I were to say, you know, I'm interested
4 in learning about sailing, could the Court give me -- could
5 the Court tell me, you know, what -- what should I get for a
6 sailboat. And the Court were to give me a recommendation
7 about that, would say I think you should get this or, you
8 know, you should get this, the Court did not become the
9 leader or organizer of -- of my sailing interests.

10 And I think what all of this stems from is that a
11 core misperception about Mr. Barker's role in this offense.
12 Mr. Barker spoke to the Government after his arrest at
13 length. He gave a lengthy confession. And though, at first
14 he was a little bit evasive, ultimately he was very, very
15 forthcoming, and the Government has acknowledged that he was
16 forthcoming and truthful during his confession.

17 And in that, Special Agent Kozen asked him, Where
18 did you get this idea to get a gun? Did it come from a
19 conversation you had with Mr. Litteral?

20 And Mr. Barker said, No. He said, I just wanted
21 one. I wanted one for safety. I wanted one for security. I
22 wanted one to protect my family.

23 He made the decision that he wanted to get a gun
24 and then he contacted Mr. Litteral and asked Mr. Litteral to
25 do, what was in his words, a "favor." And that's reflected

1 throughout. It's reflected in what Mr. Barker then said
2 about why he thought Mr. Litteral couldn't get the gun. He
3 told the agents, yeah, he told me he got denied, but I
4 figured he just didn't want to deal with it. I figured he
5 just didn't -- didn't -- he got cold feet and didn't want to
6 go through with it.

7 This is not the mind-set that you have when you're
8 being instructed by somebody. You don't think, Well, you
9 know, when I asked them to do a favor for me and they decided
10 they just don't feel like doing it. And -- and I think
11 that -- that issue, though, that's about the purchase of the
12 firearm. I think that misperception, the idea that
13 Mr. Litteral somehow told Mr. Barker that he needed to go out
14 and get a gun, which Mr. Barker said in a confession, which
15 the Government has endorsed as being truthful, he said no, he
16 didn't. This didn't come from a conversation with
17 Mr. Litteral. I just decided I wanted this.

18 THE COURT: All right. Let me hear from Mr. Savage
19 on this.

20 MR. SAVAGE: Yes, Your Honor. We would again rely
21 on our motion. I mean, first of all, I don't dispute the --

22 THE COURT: Honestly, I'm having some problems with
23 this.

24 MR. SAVAGE: No, I understand. I understand.

25 THE COURT: Because we're really talking about

1 three people, and it doesn't -- clearly doesn't have the type
2 of hierarchy, you know, that 20 or 30 people in a conspiracy
3 might have.

4 MR. SAVAGE: Yeah, no. It's not -- it's not --
5 he's not the, you know, the Medellín Cartel here. And we're
6 not alleging that. And I think that -- and I don't dispute
7 what the defense, Mr. Davis, is saying here. And I don't --
8 neither do I think, as the defense says in his brief, that we
9 misrepresented the facts. I think that's a bit -- that's a
10 bit harsh. But I do think that there are three instances
11 that support this, or at least two instances. Let me go back
12 to that.

13 First of all --

14 THE COURT: Well, I've got -- I've got your
15 memorandum.

16 MR. SAVAGE: Yeah. And we're going to rely on our
17 argument here on page 8. I'm happy to call Agent Gornozio to
18 substantiate this. And you're right, Your Honor. We're
19 relying on not just the offense conduct with regards to the
20 gun straw purchase and the ammunition, but we're relying on
21 the -- the overall relevant conduct in this case.

22 THE COURT: See, I'll tell you one thing that
23 troubles me is that Mr. Litteral to me seems more like a drug
24 pusher than a drug organization head. And that's --
25 that's --

1 MR. SAVAGE: Well, it certainly --

2 THE COURT: It's someone --

3 MR. SAVAGE: Right.

4 THE COURT: -- that is finding vulnerability of
5 Mr. Barker and passing him prescription drugs that are not
6 prescribed to Mr. Barker. I don't -- I don't view that as a
7 supervisor.

8 MR. SAVAGE: No, you're right, Your Honor. I think
9 the case that lays this out is *Steffen*, which is at 741 F.3d
10 411. I think the defense makes a legitimate point. I mean,
11 you have to be more than just an adviser. You have to be --
12 you have to exercise some control or direction over it.

13 Steffen, the guy was -- the defendant was a -- I
14 believe he was a -- some sort of police officer in South
15 Carolina, and he was -- he was protecting a ring of people
16 that was distributing marijuana plants and some other kinds
17 of drugs. The Court in that case, the Fourth Circuit, found
18 that he was a manager in there because he was operating and
19 controlling the fact that people can get caught or not get
20 caught.

21 In this particular case, we think that the control
22 with regards to Mr. Campbell and Mr. Barker occur with
23 regards to the relevant conduct, which is the making of the
24 manufacturing of explosive devices. It's clear from the
25 evidence that was in the complaint and in the indictment

1 that -- and we're happy to put on additional evidence, that
2 Mr. Litteral was directing Mr. Barker on what pipes to get,
3 what kind of explosives. He was talking to --

4 THE COURT: Well, and I understand what you're
5 saying. I think it does seem to be sufficient evidence in
6 the record that he was giving instructions.

7 MR. SAVAGE: Yes.

8 THE COURT: Once, again, an instructor is -- is not
9 necessarily a leader or supervisor.

10 MR. SAVAGE: I understand, Your Honor.

11 THE COURT: Yeah.

12 MR. SAVAGE: The other instance we would point out
13 is not only was he selling drugs to Mr. Barker, but he was
14 also trying to sell drugs or getting drugs to Mr. Campbell --

15 THE COURT: Right.

16 MR. SAVAGE: -- to sell in his shop. So those are
17 the two things --

18 THE COURT: And I agree with you. I think the
19 evidence supports that.

20 MR. SAVAGE: Right.

21 THE COURT: But I also think it was not as a leader
22 or supervisor, but -- because he needed money. He was having
23 financial --

24 MR. SAVAGE: There you go.

25 THE COURT: Mr. Litteral was having serious

1 financial problems and he was selling prescription drugs.

2 MR. SAVAGE: We certainly respect the Court's view.
3 The Government doesn't see it that way, but that would be the
4 evidence we present.

5 THE COURT: All right. I do think it's a close
6 call. It's a tough one. Close calls go to the non-moving
7 party. In this case -- when I say "non-moving party," I
8 should say the party that is trying to -- that is objecting
9 to an enhancement. The party that's supporting the
10 enhancement has got the burden of proof.

11 So the Government has got the burden of proof on
12 this. It's a close call. Tie goes to the defendant. So I'm
13 striking the two-level enhancement for organizer, leader,
14 manager or supervisor, which changes the total offense level
15 to 17.

16 Is that right?

17 MR. SAVAGE: Yes, Your Honor.

18 MR. DAVIS: Yes, Your Honor.

19 THE COURT: Okay.

20 All right. Any other objections to the guidelines
21 calculations?

22 MR. DAVIS: No, Your Honor. We have our
23 outstanding motions for departure, but obviously --

24 THE COURT: All right. 17 offense level, criminal
25 history category I, range of 24 to 30 months?

1 MR. SAVAGE: Correct, Your Honor.

2 THE COURT: All right. Thank you.

3 All right. Mr. Davis, you may proceed.

4 MR. DAVIS: Thank you, Your Honor.

5 I'll start with our motions for downward departure.
6 Actually, I'm not going to do that. I'm going to start with
7 something slightly different because I do think it's
8 important to talk about the offense a little bit more at this
9 point because I think there are a couple misperceptions that
10 do need to be corrected.

11 I don't take issue necessarily with the Court's --
12 with the Court's language and analysis regarding
13 Mr. Litteral's pills.

14 THE COURT: Well, but he was -- he's a drug
15 distributor, and it sounds like he was taking advantage of
16 Mr. Barker's addiction.

17 MR. DAVIS: That last part is what I do take some
18 issue with, Your Honor. And -- or at least I take some issue
19 with the concept of Mr. Barker as being this vulnerable
20 person who was snared in. Because throughout his interview
21 on multiple occasions Mr. Barker told the agents that he was
22 doing things such as getting pipes from Mr. Litteral because
23 he wanted to get into Mr. Litteral's good graces so he could
24 make Mr. Litteral believe he was his friend. And then he got
25 to meet Mr. Litteral because he wanted --

1 THE COURT: Aren't you being really inconsistent
2 here? You just opposed this supervisor, leadership
3 enhancement, and now you're saying Mr. Barker is trying to
4 develop a closer relationship with someone that it sounds
5 like he's seeking leadership from Mr. Litteral.

6 MR. DAVIS: No.

7 THE COURT: It sounds a little inconsistent.

8 MR. DAVIS: No, Your Honor. He wasn't seeking
9 leadership; he was seeking pills. It's very clear what he
10 wanted.

11 THE COURT: Okay.

12 MR. DAVIS: He wanted pills.

13 THE COURT: Well --

14 MR. DAVIS: And that's the point.

15 THE COURT: Okay.

16 MR. DAVIS: And the point is certainly Mr. Litteral
17 sold him the pills.

18 THE COURT: He was selling them because he had an
19 addiction though.

20 MR. DAVIS: That may have been his motivation
21 without a doubt.

22 THE COURT: Yeah.

23 MR. DAVIS: That may have been his motivation
24 without a doubt. I don't take issue with that. I don't take
25 issue at all with that idea that Mr. Litteral sold him pills

1 and he should not have. He certainly has admitted that and
2 taken responsibility for.

3 THE COURT: And he made several thousand dollars.
4 I read \$5,000 or something like that somewhere in one of
5 these multiple pleadings in this case.

6 MR. DAVIS: To be honest, I do not know that.

7 THE COURT: It wasn't -- it wasn't -- it wasn't one
8 or two or three pills.

9 MR. DAVIS: That's correct.

10 THE COURT: It was a substantial amount of pills
11 over an extended period of time.

12 MR. DAVIS: That's correct. And he's taken
13 responsibility for that. I certainly think we would have a
14 lively debate about numbers if that were an issue in this
15 case, but it really isn't.

16 But I do think there's a concept and a notion that
17 Mr. Barker here was, you know, some sort of innocent addict
18 who just got sucked into this whole behavior and then
19 Mr. Litteral was forcing a gun on him and telling him to go
20 do all sorts of stuff. And that's just not accurate.

21 THE COURT: Well, I -- the second part, I agree. I
22 don't think he was forcing a gun on him. I think he was
23 buying a gun for him as a strawman.

24 MR. DAVIS: Right.

25 THE COURT: They -- they -- you know, whatever

1 their ultimate intent what is -- is relevant to this hearing
2 today, but the three crimes of conviction aren't dealing with
3 the ultimate purpose of possessing the --

4 MR. DAVIS: That's right.

5 THE COURT: -- AR-15 and the MP-5.

6 MR. DAVIS: That's correct, Your Honor.

7 And from Mr. Barker's perspective, that purpose was
8 that he wanted a gun to protect himself. He is not a
9 believer in marshal law. He was not a believer in Jade Helm,
10 according to the interview he gave to -- to the police, which
11 I believe at that point in the interview he was being pretty
12 open and forthcoming with everything. I don't think the
13 Government has ever questioned that at this point.

14 You know, he --

15 THE COURT: They might question that. We'll see.
16 I don't know.

17 MR. DAVIS: On the record, Mr. Savage has said that
18 he was fully open and forthcoming and honest at that point
19 when he was saying that, you know, he was doing this for the
20 pills. That's why he gave -- that's why he brought pipes
21 that were not effective, and I think that that's true.

22 And I think there's an extent to which, you know,
23 Mr. Barker is not the person being sentenced here. I think
24 there's an extent to which that cuts in his favor. But I
25 think it's also an extent to which it cuts against him, and

1 that does play into our motion for departure. And that is --
2 I think when you consider the relative positions of people
3 and how we got here, the question that might be pertinent in
4 regards to Mr. Barker is, you know, what -- what type of
5 person looks at this situation, looks at this person who
6 they're claiming up through the end is their friend and
7 doesn't say, Hey, you know, it looks like your PTSD is
8 getting a little out of control. Because Mr. Barker
9 certainly thought he had it, and many, many doctors agree.
10 Hey, this is a little overboard. Maybe you ought to get some
11 help.

12 And we talk about, Well, Mr. Litteral should have
13 cut Mr. Barker off. Certainly he should have. No question
14 about it. And while Mr. Barker did say that Mr. Litteral was
15 trying to help him, we think the Government would very
16 accurately point out it's not much help when you're selling
17 drugs. On the other hand, I would point out you do not
18 really go in for a lively drug business if you're encouraging
19 your customers to quit.

20 But -- but be that as it may, you know, certainly
21 Mr. Litteral should have done more there. But by the same
22 token, Mr. Barker was using him too. Mr. Barker was using
23 him very much.

24 THE COURT: Well, certainly as a strawman.

25 MR. DAVIS: Yes. Certainly as a strawman.

1 THE COURT: Absolutely. I mean, he --

2 MR. DAVIS: Certainly as a strawman.

3 THE COURT: Right.

4 MR. DAVIS: And I think that that's something
5 that -- that shouldn't be ignored. And I think Mr. Litteral
6 takes responsibility for his actions, but there's a lot of
7 ambience of this case. A lot of what he wasn't convicted of,
8 which has -- which is not really an accurate picture. I
9 think that's what the Court has to --

10 THE COURT: I understand that, and the Government's
11 not using that per se for the hearing today other than to say
12 there -- we have this -- some evidence off of the wiretaps
13 that suggests that as well as -- I don't know whether or not
14 their initial evidence for the wiretap was. But it's --
15 it's -- the Government's permitted to say this is the motive
16 for a straw purchase.

17 MR. DAVIS: Of course. Of course.

18 THE COURT: Right. But I guess -- I guess one of
19 the things that troubles me today is exclude military
20 operations, training operations in Texas and just look at the
21 fact that Mr. Litteral knew Mr. Barker had a serious drug
22 addiction and knowingly went and attempted to purchase a
23 firearm for him knowing the drug addiction, not -- not merely
24 that he was a convicted felon, but knowing he was vulnerable
25 as an active drug addict. And that -- an active drug addict

1 is, of course, a prohibited person in a 922(g).

2 So that -- I -- I am troubled about that. I am
3 troubled. And you're right, it's a two-way street.

4 Mr. Barker was taking advantage of Mr. Litteral because
5 Mr. Barker couldn't purchase a firearm, but Mr. Litteral was
6 taking advantage of Mr. Barker by, you know, purchasing a
7 firearm for an addict and someone he wanted to keep in his
8 good graces. Mr. Litteral wanted to keep in Mr. Barker's
9 good graces because Mr. Litteral wanted to continue to sell
10 drugs to Mr. Barker. At least it appears that way from the
11 financial condition of Mr. Litteral at the time these events
12 were going on. Right? I mean, he had serious financial
13 problems, right?

14 MR. DAVIS: Well, certainly. He's certainly
15 indigent throughout this.

16 THE COURT: Right.

17 MR. DAVIS: I think there's no question about that.
18 I think there's no question about that. And I think -- you
19 know, I think the Court does a very good job of cutting away
20 the chaff of this case, and I think that's -- that is what
21 this Court can do today that is most important, is to cut
22 away the chaff of this case and focus on what it really is
23 about.

24 And it is about Walter Litteral who was a decorated
25 war veteran who has been diagnosed with severe PTSD who

1 himself was addicted to the prescription painkillers that he
2 was feeling, and who had a very, very, very difficult
3 relationship with what was going on in the world. And part
4 of that influenced by -- not entirely, but part of that
5 influenced by his mental condition.

6 When -- and just to tie this all back into the
7 departure motions, I'm going to start with the 5H1.11
8 military service departure. That used to be something that
9 the guidelines forbid the Court from looking at. In 2010,
10 following the Sentencing Reform Act, the committee went back
11 and looked at it again and reconsidered it. And they decided
12 military service is something that is entirely different from
13 these other good works that should be excluded.

14 They did that in some degree of reliance, if not --
15 well, in fact, directly citing Supreme Court case *Porter v.*
16 *McCullom* where the Supreme Court recognized military service
17 is something that we consider to be a mitigating factor in
18 our nation when it is -- when it is present to an unusual
19 degree.

20 And I don't -- and so now that is an encouraged
21 departure under the guidelines.

22 THE COURT: Well, I wouldn't say it's encouraged.
23 It's -- when it's present to an unusual degree and
24 distinguished the case from the typical cases. So I
25 wouldn't -- I would say that is clearly giving more

1 discretion to judges before the amendment in 2010. But I
2 wouldn't say it encourages it. It says -- actually, when
3 you're dealing with these policy statements and Chapter 5(h)
4 of the guidelines, I have a hard time understanding to an
5 unusual degree and distinguishes case from a typical case.
6 There's really not much guidance to -- for courts in
7 understanding that phrase.

8 MR. DAVIS: Well, I think you're -- you're -- Your
9 Honor is correct, that Your Honor has to find that it is, you
10 know, unusual -- the present of unusual degree and
11 distinguishes this case from other cases. And I agree with
12 the Court that there is not a whole lot of guidance out there
13 on that.

14 I will note that, you know, the Fourth Circuit
15 defines an encouraged departure as being one that is phrased
16 in this way, if the Court finds that it is --

17 THE COURT: Right.

18 MR. DAVIS: -- finds those factors.

19 THE COURT: I agree if you find those factors --

20 MR. DAVIS: It is encouraged.

21 THE COURT: -- then it is encouraged in that
22 context.

23 MR. DAVIS: And --

24 THE COURT: It's just finding them is hard to do
25 because we really have very little guidance on what that

1 phrase means.

2 MR. DAVIS: I think that's true, Your Honor. But I
3 think in this case by any standard, Mr. Litteral ought to
4 meet it. There's no question that his military service is
5 unusual. He is highly decorated. He has his Bronze Star --
6 he has a Bronze Star with a Combat V for his courageous
7 actions in the first Gulf War that resulted in the capture of
8 the first POWs of that war where he with -- and I believe the
9 words of the accommodation are complete disregard for his own
10 personal safety, led machine gun -- two machine gun groups
11 back and forth across 300 meters of constantly -- constantly
12 attack open desert.

13 He has this long history. He has this long combat
14 record, this record of extreme service in combat on the front
15 lines in Iraq, and that has shaped everything about who he
16 is.

17 I don't think that the Court can completely -- when
18 considering, you know, how does this apply here, I don't
19 think the Court can divorce it from the 5H1.3 departure on
20 mental health. And I guess the good news is the guidelines
21 tell the Court you shouldn't divorce it. You should consider
22 it sort of both of these in conjunction with other potential
23 factors. And, you know, what -- I hope the Court had the
24 opportunity to read Dr. Cohen's report.

25 THE COURT: I did. And I read the whole report

1 because you actually said in your pleading that I need to
2 read the whole report. I didn't just go to the end and read
3 the conclusion. I read all 20 pages of it.

4 MR. DAVIS: I greatly appreciate that, Your Honor.
5 I think some of the most moving parts of that report was
6 Mr. Litteral's reflections on his own memories. And I think
7 reading those really show the lasting effect this trauma has
8 had on him, which is -- I think is why -- a large part of why
9 Dr. Cohen is able to reach the conclusion that PTSD -- severe
10 PTSD in conjunction with other factors significantly
11 contributed to the circumstances here.

12 THE COURT: Well, but he -- you -- you said it
13 correctly by saying other factors, and he lists a lot of
14 other factors.

15 MR. DAVIS: He does.

16 THE COURT: And, you know, the severe financial
17 condition the defendant was in had -- had to have an impact
18 on his depression. His severe back pains certainly had an
19 impact on how he acted. And as you said, he needed drugs
20 himself for his back pain. So -- so, yes, it makes sense
21 that PTSD is one of many contributing factors. But your own
22 expert report says there was a lot of things that contributed
23 to his condition in 2015.

24 MR. DAVIS: There were multiple things, yes. And
25 I -- one thing that I think is an excellent jumpoff in terms

1 of his own addiction, where does that come from. It comes
2 from the fact that Mr. Litteral ends up going to his own
3 doctor to -- you know, for all of his needs. Why does that
4 happen? It happens because he does not feel he's getting
5 sufficient treatment at the VA for his PTSD.

6 THE COURT: Right. The VA is -- the VA is
7 overworked. It's not a secret that the VA has delayed
8 appointments.

9 MR. DAVIS: Right. And the unfortunate result, he
10 ended up getting much worse treatment by leaving the VA. But
11 he made that decision because he didn't think he was getting
12 the treatment at the VA at a time when, you know, he was --
13 his mental condition was such that he was, frankly, maybe on
14 the verge of committing suicide.

15 THE COURT: He actually attempted.

16 MR. DAVIS: He did. That's correct.

17 And the question for the Court is, is the PTSD
18 present to an unusual degree? I don't think the ordinary
19 case involves much PTSD at all. Certainly in this case it is
20 present in a significant contributing factor. So, yes, it's
21 present to an unusual degree. Does it distinguish this case
22 from the others? I think it absolutely does. Once again,
23 you have it as a significant contributing factor to this
24 situation.

25 So I think -- I think that it is clear that this

1 is -- that this PTSD contributes to an unusual degree in that
2 it distinguishes this case from others.

3 Now, at that point, it is still up to Your Honor to
4 make the decision about whether to apply the departure or
5 not. But at that point, it is an encouraged departure, and
6 that's what we request the Court to do, is to enter that
7 encouraged departure.

8 And I think, you know, this gets us to the larger
9 argument, the argument that really matters, the 3553(a)
10 argument.

11 The nature, first to start off with, Mr. Litteral,
12 his history and characteristics. The Court's had the
13 opportunity to read many letters on his behalf from people
14 who know him. And at the risk of repeating myself, as I'm
15 prone to do, I think what you see in those letters is
16 something that emerges in his military service as well, this
17 idea of someone who goes out of his way to help people. You
18 have a letter from his landscaper, from the lawn guy, who
19 says, you know, My son and I got violently robbed and
20 Mr. Litteral made us whole. He didn't have anything to do
21 with that robbery.

22 You've got numerous occasions described in detail
23 by his daughter and others where he goes out of his way to
24 help people. Even -- even in this case, as we cited in the
25 brief, even in this case, one of the factors in the Fifth

1 Circuit case actually got the transferee, the Barker
2 situation of a leadership role enhancement, is giving money
3 to the straw buyer. In this case, the money that Mr. Barker
4 told him that you can keep, he gave it to somebody who had
5 his house burn down.

6 And that ties in with this idea of a man who will
7 run across that desert with the shells flying, with the
8 bullets flying. This is not -- this isn't just disconnected.
9 These things all go together to form a picture of this
10 person.

11 And as I've listened to surveillance, one brief
12 segment stood out to me, and I'd like to -- it's very short,
13 so I'd like to play it for the Court. You know, it may not
14 have the same impact for you as it did for me, but I think
15 it's worth hearing.

16 (Video played.)

17 MR. DAVIS: And that's just a short clip. But what
18 stood out to me, it's just completely off the cuff. There's
19 no performance. He doesn't know he's being surveilled in
20 here. He is saying, you know, if I can make a deal with the
21 devil today, I'd be sick all the time so the people don't
22 have to be sick. And that's consistent with everything about
23 him, everything about what his friends and family describe.
24 It's consistent with what it earned that Bronze Star with the
25 Combat V.

1 I think that's why his history and characteristics
2 show that an appropriate departure in this case, or a
3 variance if the Court were to find that technical
4 requirements of departure were not met, is warranted. The
5 nature and circumstances of the offense, and we've gone over
6 a good bit of this, and I don't want to go -- I'll try not to
7 belabor it too much.

8 One thing I do want to point out in regards to
9 Mr. Campbell's role, because we have not discussed that very
10 often, is the evidence as I have reviewed it, and I've gone
11 through very thoroughly trying to find something that -- as
12 far as I can tell is not there. But it certainly seems to me
13 that there's no real evidence that Mr. Litteral knew
14 Mr. Campbell was creating this grenade until after he had
15 done it. It's very clear, very, very clear that on
16 July 29th, Mr. Campbell comes in to the confidential source's
17 store and says, you know, and it's like working on a grenade
18 in the store with a screwdriver and tells him, Yeah, I have,
19 I've already assembled one of them. And this is news to the
20 source.

21 After Mr. Campbell leaves, he gets on the phone
22 to -- I'm not sure which agent. He gets on the phone and
23 says, You're not going to believe this. And then when
24 Mr. Litteral comes in, he doesn't know about it.

25 So they had -- they had certainly discussed

1 larger -- the larger ideas here. They certainly discussed
2 their fears. They had certainly discussed their preparations
3 up to and including explosives, but there is nothing in the
4 record that shows Mr. Litteral telling Mr. Campbell to create
5 a grenade. They do talk about smoke grenades, but those are
6 very clear that they say smoke. Until Mr. Campbell had
7 already done it.

8 So to the extent that that is a part of it, I -- I
9 think that, you know, it's a -- to say that Mr. Litteral was
10 instructing him how to make a grenade is not really accurate
11 here because it's already done to the point that it was when
12 the Government found it by the time Mr. Litteral was aware of
13 its existence.

14 THE COURT: All right. Summarize your arguments on
15 the departures and variance.

16 MR. DAVIS: Yes, Your Honor.

17 So in summation -- well, let me just hit the
18 highlights very quickly.

19 THE COURT: All right.

20 MR. DAVIS: The question first -- the factors of
21 3553(a) to punishment, what is sufficient punishment in this
22 case. Mr. Litteral has been locked up for almost a year now.
23 He has lost his spot as director. He has lost a lot of the
24 glory that he carried before his offense. That is certainly
25 something the Court should not ignore.

1 And one thing that I think the Court should
2 absolutely consider is that despite the fact that
3 Mr. Litteral was not in any way planning an attack unless
4 attacked first, his name comes up in media sources over and
5 over again and linked to domestic terrorism. That's a stain
6 he will never wash off. And this is not a domestic terrorism
7 case.

8 He made a lot of mistakes, and he admits those.
9 But his name is forever going to be associated with that, and
10 *The Washington Post* and *The New York Times*. And that is --
11 that is a major -- a major drawback that he has received, a
12 major corollary punishment that when the Court considers both
13 -- both the punishment and the deterrence, I think the Court
14 has to consider those things.

15 THE COURT: Yeah, but I'm not sure general
16 deterrence is in your client's favor, though.

17 MR. DAVIS: Well, Your Honor --

18 THE COURT: Because one -- in the argument over the
19 breadth of the Second Amendment, which is clearly a hot issue
20 in Washington right now, there's one thing that really both
21 sides agree that there's a certain group of American
22 citizens, of resident aliens that are prohibited from
23 possessing a firearm: Convicted felons, drug addicts, aliens
24 who are not lawfully here, misdemeanants who commit domestic
25 crimes and domestic violence. There's a group that's been

1 recognized are dispossessed to firearm.

2 And what he did was he helped one of those
3 dispossessed persons. That is -- that is one thing where
4 there is pretty much uniform agreement that -- most people in
5 this country agree that there are certain people who should
6 never get firearms until they've gotten their civil rights
7 back, and he -- he violated that. That's -- that's -- that
8 as important -- that's not domestic terrorism, but that is a
9 serious issue.

10 MR. DAVIS: Yes, it is, Your Honor. And he takes
11 full responsibility for that.

12 What I will point the Court to is the issue of
13 general deterrence. First of all, we have to put all these
14 things in perspective. You know, where does he fall on the
15 spectrum here. In terms of a felony, you know, Christopher
16 Barker's was in 1993, and it was a suspended sentence. He's
17 still a felon. Still should -- absolutely should not
18 rebutted (phonetic) to a period until the end.

19 But on the scope of it, this is not, you know,
20 giving a gun to someone who got a bank robbery three years
21 ago or something to that. I mean, on the relative spectrum
22 of providing a firearm to a felon, it is relatively low on
23 there.

24 The other thing I want to --

25 THE COURT: But he also -- but Mr. Barker was an

1 active drug abuser, and drug abusers are prohibited persons,
2 I believe, under 922(g)(1).

3 MR. SAVAGE: Yes.

4 MR. DAVIS: That is absolutely correct, Your Honor.
5 I would -- I am curious about how much the general public is
6 aware of that particular fact.

7 THE COURT: You're probably correct on that. It's
8 not well known.

9 MR. DAVIS: And the last thing I would say on
10 general deterrence is, you know, not very long ago there's
11 a -- a list of things about deterrence put out. Five major
12 facts about deterrence. And particularly, among them sending
13 an offender to prison isn't a very effective way to deter
14 crime, and increasing the severity of punishment does little
15 to deter crime. This is -- these are in accord with a lot of
16 the research that's out there. But the reason I bring this
17 particular publication up is because it was not done by a
18 particularly defendant-friendly group. It's the Department
19 of Justice.

20 So the Department of Justice acknowledges that
21 extending sentences, putting people in prison is not a
22 particularly effective general deterrent. In Mr. Litteral's
23 case, he's been in prison for a year. He has lost an awful
24 lot, and it's happened publicly. I think general deterrence
25 actually is not greater served by additional time in this

1 case.

2 And in terms of incapacitation and rehabilitation,
3 I think those can go hand in hand because I think what
4 Mr. Litteral needs is help. And that's, you know, what
5 Dr. Cohen said, and Dr. Cohen set out a series of
6 communications that he believed will substantially reduce the
7 rehabilitation.

8 THE COURT: I don't think anyone disagrees with you
9 on that last point. I'm sure the Government agrees that the
10 defendant should receive mental health treatment.

11 MR. DAVIS: And I'm -- I'm -- I hope so, and I'm
12 glad to hear that.

13 The question is: Is an extended sentence going to
14 do anything good for him? I think the answer is no. What's
15 going to do good for him is putting him out in a monitored
16 program where he can get the help he needs and go back to
17 being the person he has been, go back to the person who won
18 that Bronze Star with Combat V, go back to being that type of
19 person who puts roofs on people's house for free because they
20 can't afford it, go back to being the father who got custody
21 of his kids in the divorce, which is, you know, monetarily
22 usual. That's what we're asking the Court to do, to impose a
23 sentence that would be a two-level -- or a four-level
24 departure either structured as two under each of the
25 departure's prongs. Alternatively, a variance under 3553(a)

1 to a year and a day. That, I believe, is the appropriate
2 sentence in this case.

3 Your Honor, he has family members here on his
4 behalf, a number of them. You know, I'd hope to get a chance
5 to speak to them before we began, but I have not. But I
6 would still -- I still know a number of them would like to
7 address the Court, if the Court is amenable. I know I've got
8 quite long, but if we could do that at this time.

9 THE COURT: Yes. But I'd like to limit it to two
10 people, if that's possible.

11 MR. DAVIS: Two people. Okay. Can I have just a
12 moment, Your Honor?

13 THE COURT: Yes.

14 (Pause in proceedings.)

15 MR. DAVIS: Wayne Litteral, his son.

16 THE COURT: I think make it three. I think more
17 well-rounded presentation.

18 Please step forward and stand between the two
19 counsel's tables and state your full name.

20 MR. WAYNE LITTERAL: Wayne Tyler Litteral, sir.

21 I just want to point out that my dad, he has --
22 he's the one that pushed me through everything, gone through
23 everything. I went to the military and got out. All I did
24 is want back home. I already missed my first birth when I
25 was in El Paso, and now our other son is being born,

1 surprisingly either today or tomorrow.

2 THE COURT: Congratulations.

3 MR. WAYNE LITTERAL: Thank you, sir.

4 I just want him back home. He already missed the
5 first year of my first son being born. I don't want him to
6 miss the second. Because, I mean -- when I moved back last
7 year, he helped me out a lot. So, I mean, I'm going to raise
8 my son like how he raised me.

9 THE COURT: Thank you, sir. Thank you very much,
10 Mr. Litteral.

11 MR. KNIECLEY: Good afternoon, sir. My name is
12 Shaun Kniecley. I'm the nephew of Mr. Litteral. I've known
13 Mr. Litteral ever since I was three years old. He's my
14 babysitter. He used to walk me and my sister to school
15 safely every morning, get us ready. On top of that he was
16 taking care of his mentally handicapped brother at the same
17 time.

18 In 30 years he's never changed. He's always been
19 that way. He is family bound and family strong. And my
20 father passed away when I was 16. And Mr. Litteral stepped
21 up as my father figure and gave me guidance in life.

22 I was proud to join the military, and he gave me
23 good guidance. He goes, I knew you could do the Marine
24 Corps, but you're better than that. That's why I decided not
25 to go to Marine Corps. I went into the Navy.

1 THE COURT: And he said do better than that, in the
2 Navy?

3 MR. KNIECLEY: Yes. Yes.

4 And after that, years, we've always been in touch.
5 I seen him raise his family, get his children, great
6 children. And I found on hard times. I went through a
7 bitter divorce, lost my job, had nowhere to go, and without
8 hesitation Mr. Litteral brought me into his house with his
9 family, F.3d me, clothed me, gave me my CDL's back and got me
10 a job with no questions asked. Thank you, sir.

11 Thank you very much, sir.

12 MRS. LITTERAL: I'm Kristal Litteral, his wife.
13 We've been together 16 years. And there would be a whole lot
14 of people, if they could. They live out of state or jobs or
15 just can't make it physically.

16 We want him back home. I know that he knows what
17 he's done has hurt all of us. He's made some poor choices,
18 but I know he's learned from them and I know it's not
19 somewhere he ever wants to be again. He's a great father and
20 a great -- and I know we're not all perfect and we've all
21 made mistakes, and he made mistakes, but I think that is what
22 you learn from. I think he's learned he doesn't want to be
23 away from his family ever again. And we just all need him
24 back home. It's been very hard. We want to take care of
25 him.

1 Thank you.

2 THE COURT: Thank you, ma'am.

3 MR. DAVIS: One last very corollary matter, but I
4 do think it's worthy of the Court's attention. Obviously,
5 Mr. Litteral owned a large amount of legally possessed
6 firearms that were not --

7 THE COURT: He sold them all.

8 MR. DAVIS: He sold every single one.

9 THE COURT: Except for, I guess, one.

10 MR. DAVIS: Except for one family heirloom that
11 went for his grandson with the Government's kind permission
12 on that. And we greatly appreciate the FBI's coordination
13 with us to get that done.

14 He made a point of getting rid of every single one
15 he had. So there's no concern that he's going to go back in
16 possession of any of these.

17 THE COURT: Mr. Litteral, you have the right to
18 address the Court if you so choose.

19 THE DEFENDANT: Yes, sir. May I?

20 Sir, I -- I feel as though in my heart I'm a great
21 embarrassment and even a bigger humiliation to my family. I
22 know what I did was wrong. I take full accountability and
23 total responsibility for the actions of which it would not be
24 coming of me any other day than it has.

25 I didn't know I had PTSD until my wife diagnosed

1 it. And when she did and we started seeking treatment, it
2 was her that brought me forward to get treatment. I owe a
3 lot to my wife and my children. They've always been there
4 for me. They will never turn their back on me. They've all
5 said, Dad, we're all here with you. Honey, we're all here
6 with you. I don't know if I deserve it, but I certainly got
7 it and I'm proud and grateful for it.

8 Everything that's been discussed in here today that
9 I have done, it's inexcusable. I fight with it every day
10 when I'm laying in my cell thinking, Why in the world -- how
11 did I get to this place. How did I get in this position.
12 Bad judgment, poor decision-making and just complete overall
13 error lifestyle.

14 That, sir, being known and the lessons I learned, I
15 didn't just hurt myself, I killed my family. And that --
16 that means more than me. And I apologize to my family and
17 also apologize to the courts for my actions which has taken
18 up the time.

19 Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Litteral.

21 Mr. Savage.

22 MR. SAVAGE: Thank you, Your Honor.

23 Your Honor, I'm not going to insult this Court by
24 saying that it should not consider the needs of a veteran,
25 particularly this veteran. I think this Court knows more

1 about being a veteran than many people would. I think the
2 Government also is aware, perhaps was more experienced with
3 veterans than maybe even the defense counsel in this case.

4 THE COURT: Well, I mean, I -- we both know that
5 you served your country in the Air Force.

6 MR. SAVAGE: Yes, sir.

7 THE COURT: And I just recently retired, I believe.

8 MR. SAVAGE: Yes, sir. And, Your Honor, I
9 certainly respect the fact of people who do it, not
10 necessarily to retirement, and I certainly respect more
11 people who serve their country and put their life in danger,
12 and there's no dispute that Mr. Litteral did that.

13 But counter that with honor and duty and having
14 supervised Marines and knowing Marines, as this Court has,
15 it's just inconsistent with a Marine's creed. The fact that
16 this defendant has many people in his family -- his sons and
17 his nephew -- who respect him and love him who are also
18 military members, but then the plot to kill them in the event
19 that -- because of some fantasy that the Government is going
20 to come and take his guns because he doesn't agree
21 politically is simply inconsistent with the -- with the duty
22 and honor that a Marine should have.

23 And as a veteran, many people in this country
24 respect veterans, as they should. But how can veterans be
25 respected when they plot to overthrow the very government

1 that they -- that they promised and pledged to serve? The
2 Constitution doesn't -- when you pledge to serve the
3 Constitution, honor and obey the orders of your superiors, as
4 this man did as a Marine, surely that would have carried on
5 to his life experiences.

6 So for those things, Your Honor, the Bronze star is
7 certainly something to be considered. Making pipe bombs and
8 planning to blow up military members and threatening, as he
9 did, in a conversation with his wife and I quote, "If they
10 come to get my gun, it'll be a hell of a fight. You know
11 that's what I'm worried about. If it's local police, I'll
12 have a hard time shooting local police, I really would. But
13 if it's the effing suits, people coming dressed in
14 paramilitary with blue hats and blue helmets, then I'm going
15 to have a -- I'm not going to have a hard time shooting
16 those." I won't say the last word.

17 And Ms. Litteral says, "Let's not talk about that."

18 "Because I'm just saying if Crown Vics pull up and
19 that Mfer or Suburbans or Tahoes and they're all blacked out,
20 somebody's dying. I got to get the refrigerator cleaned out
21 so I can put all my automatics in there so I grab it and get
22 in the corner. I'm just paranoid as hell."

23 Well, maybe that's an expression of PTSD or maybe
24 that's an expression of like, No, I'm going to be above the
25 law.

1 Now, PTSD, as the Court noted, manifests itself in
2 different ways, as does back pain. Here's a picture of the
3 defendant and his wife as she appears -- speaking of -- there
4 you go.

5 So PTSD wasn't always present in this defendant's
6 life, loud noises, thrills, and that sort of thing. Here's
7 the defendant with his wife at Carowinds. His back problems
8 weren't always a problem. He certainly could have good days.
9 Here's him working out. I believe, in the defense statements
10 that defendant met his wife while working out. So he
11 certainly is able to work out and do things.

12 Now, I'm not suggesting that there aren't bad days
13 this defendant has, but here's a bad day. The defendant goes
14 into a store and sees that sign on the counter as he does it,
15 as he buys the gun for Mr. Barker. And not just any gun --

16 THE COURT: Is this -- was this taken at Gander
17 Mountain?

18 MR. SAVAGE: Yes. He buys this (indicating) gun,
19 an assault rifle. Not a pistol, not a rifle, not a shotgun,
20 not -- not some mace, 100 different things Mr. Barker could
21 have had if Mr. Litteral really wanted to counsel him as his
22 family says he has other people. He buys this (indicating)
23 gun with a 30-round shot.

24 And you mentioned the various problems that
25 Mr. Litteral had with finances. But where did he spend his

1 money? He spent his money purchasing pipe bombs, various
2 things. Here are just a few of the guns that were found --
3 and they're legal. I'm not saying they weren't -- found in
4 his house. Here's his gun cabinet. I'm going to put this
5 the right way.

6 It's a virtual arsenal. And if he was truly there
7 or a peaceable person, what person drives around in their car
8 with two pistols strapped in a place where you can grab them
9 at any moment.

10 And if you recognized that he had PTSD all those
11 times, you got to ask yourself why, why this family allowed
12 somebody like this who has these problems, who attempted
13 suicide, to possess a virtual arsenal of weapons.

14 Now, one of the things that we have a problem with
15 in this country is people with psychological problems having
16 access to legal weapons. This person went beyond that,
17 knowingly about those weapons. But more than that, this is a
18 guy who is getting 100 Hydrocodone and 50 Oxycodone a month.
19 And he's selling them.

20 And, Your Honor, this is where I think the
21 Government's recognition of the defendant's service comes in.
22 What the defense counsel does not mention in this whole case
23 is this is a charge market. We selected the charges that
24 would be applied here. We deliberately did not select, and
25 the Court should know this, the drug charges in this

1 indictment. And the reason we didn't select them is because
2 in the 2015 amendments to the guidelines, the way that
3 Hydrocodone is treated, it became a Schedule II drug. If the
4 Government had charged the Hydrocodone in this case and we
5 had proved, as I think we could, that he distributed 100
6 Hydro and 50 Oxy per month to the defendant, to the defendant
7 Mr. Barker, over 24 months, the offense level would have been
8 28.

9 Now, the defendant before he walked into this
10 courtroom, recognizing his military service, wanting to do
11 the fair thing in here is facing a level 17. He's already
12 been the beneficiary of a 10-level departure before he came
13 in. This was a charge market.

14 And what he doesn't say when he was helping people,
15 he knew that Mr. Barker was an addict, but he didn't stop
16 giving it to him. He didn't help him seek treatment. He
17 didn't point him in the right way. He kept feeding him these
18 pills. In addition, when he needed more money, he tried to
19 sell his pills to Mr. Campbell. But Mr. Barker was always a
20 willing person to buy them because he knew he was addicted.
21 Mr. Barker admitted it and Mr. Litteral admitted it in his
22 statement.

23 So if there's anything that Mr. Litteral should be
24 ashamed of, he should be ashamed of feeding the addiction of
25 Mr. Barker and then selling him or trying to get for him this

1 gun.

2 If he knew he had a problem, as he did, what --
3 what incentive is there for this person to seek treatment
4 from the VA or anywhere else. He didn't stop going to the VA
5 just because the psychiatrist wouldn't see him. He stopped
6 going to the VA because the VA has a good system of
7 monitoring how many Hydrocodone and how many Oxycodone
8 they're getting. He went because he has drug-seeking
9 behavior to other freaking -- or other -- sorry -- other
10 doctors who would give him drugs so he could sell them. And
11 if he had the problems he had, he wasn't using the drugs; he
12 was selling the drugs regularly for 24 months.

13 Here, the Court's right. He's a drug pusher. And
14 where in the analysis of this, of PTSD, does it say, I became
15 depressed and paranoid. I lost control of myself. I didn't
16 understand my government. I became paranoid so I decided to
17 become a drug pusher. Literally, a drug pusher.

18 And that has consequences. And you're right, the
19 Government has taken a different view than the Justice
20 Department of deterrence.

21 We're not asking an for offense level 28 here.
22 That would have been a seven- to eight-year sentence. We're
23 saying a fair sentence is somewhere in the middle of this
24 guideline. Perhaps he deserves more; perhaps not. But for
25 the fact of the matter is because guns are an important

1 thing, because putting addicts and mentally unstable people
2 in possession of guns is illegal and notably dangerous, that
3 deserves specific deterrence. It should never happen again.

4 More than that, it should be general deterrence so
5 people around this country know, as we keep saying and
6 hearing after one tragedy after another, that the gun laws in
7 this country have force and they have effect. So they have
8 to have some sort of meaningful punishment.

9 Do not give him seven or eight years for the drugs,
10 but do give him 27 months, somewhere in the middle of the
11 guideline, for the conduct that he has pled guilty to.
12 Although it's only a part of it. Only part and parcel.

13 If we had parsed this whole thing out, perhaps
14 Mr. Davis would have a point. Perhaps we would be talking
15 about a Zone C. But we're not talking about just a sliver of
16 the behavior. We're looking at the whole picture, as the
17 Government did when it made this plea bargain.

18 So but for the fact -- but for the fact that the
19 Government allowed this defendant to plead guilty to three
20 counts, not including the drugs, we would be looking at a
21 much different situation.

22 The defense wants you to cut it in half based on
23 that -- on top of that. We suggest that's unreasonable.
24 It's unfair. And with regards to creating disparate
25 sentences, it's certainly unfair to Mr. Barker and

1 Mr. Campbell who cooperated and got 21 months each and
2 provided evidence and were prepared to cooperate, pled guilty
3 before they had to go to an indictment, versus Mr. Litteral
4 who forced the Government into an indictment and did not
5 cooperate with the same degree and same matter as Mr. Barker
6 and Mr. Campbell.

7 So for those reasons, taking all of the 3553(a)
8 factors together, including the seriousness of the offense,
9 especially considering the character, the good character and
10 mental incapacity of this defendant, considering all the
11 different things, including specific and general deterrence,
12 the Government believes that a sentence of 27 months is not
13 greater than necessary to -- is sufficient, but not greater
14 than necessary to address the conduct in this case.

15 We certainly think that we could have gone much
16 higher, but we think that we were fair to this defendant and
17 we think that -- we ask the Court to be fair as well, not
18 just to the Government but to Mr. Barker and to other people
19 like him with this -- with regards to the type of conduct
20 that occurred to this case.

21 THE COURT: Thank you, Mr. Savage.

22 MR. DAVIS: Your Honor, I think there is a couple
23 of points there that need -- that desperately need rebuttal.
24 The first of which is I'm confident the Government is aware
25 that if they had applied the 2015 guideline which came into

1 effect on November 1st, 2015, to Mr. Litteral's conduct, that
2 would be ex post facto violation. So that was at non-issue.

3 What I mentioned earlier is that, you know, if we
4 had to hash out the number of pills in this Court, I think we
5 would have a lot to talk about. And I think that's
6 absolutely correct, because the only actual real evidence
7 that I have located in all of the discovery are Mr. Barker's
8 comments that Mr. Litteral sold him a couple hundred
9 Hydrocodone in the last few months and less Oxy, and
10 Mr. Litteral essentially confirmed that same thing, that
11 there was 100 in the last week. Now, there is evidence of
12 individual sales to Mr. Barker, but certainly none that would
13 increase the amount over that 100 -- couple hundred in the
14 last few months that he said.

15 THE COURT: Well --

16 MR. DAVIS: The sales that are evident are in
17 there.

18 THE COURT: Maybe Mr. Savage can help me though.
19 There's somewhere -- I thought there was like \$5,000 in drug
20 sales. Am I -- did I just make that up? I mean, this is a
21 well pled case. There's hundreds of pages of pleadings.

22 MR. SAVAGE: Mr. Barker estimated that he was
23 paying Mr. Litteral \$2,000 a month.

24 THE COURT: And for how many months?

25 MR. SAVAGE: Twenty-four.

1 MR. DAVIS: There is absolutely nothing in the
2 evidence, nothing that says 24 months. Mr. Barker did not
3 say that in his interview. He didn't say it. It didn't
4 happen. You know, he -- the closest thing to that is in the
5 factual basis there's 100 pills per month, but there is still
6 no time frame.

7 THE COURT: All right. Well, I --

8 MR. DAVIS: Regardless of that, Your Honor, we
9 would still be looking at this level 28 that Mr. Savage --

10 THE COURT: Well, I --

11 MR. DAVIS: -- because there would be an
12 ex post facto violation.

13 THE COURT: What you're saying about ex post facto
14 is probably correct. But what Mr. Savage is -- and that's as
15 to the offense level. But Mr. Savage is correct that there
16 was no charge for drug trafficking.

17 MR. DAVIS: That is correct.

18 THE COURT: And that probably would have been a
19 much more severe sentencing guideline range.

20 MR. DAVIS: I disagree, Your Honor.

21 THE COURT: All right.

22 MR. DAVIS: I think based on the actual evidence
23 that is in there, what you actually see in the testimony of
24 specific pill sales, that would end up being about an offense
25 level of 16. Now, it would probably go greater than that.

1 But still, if you doubled it, we would be at an
2 offense level of 18. And even if higher than that, you'd be
3 in an offense level of 20. The Government would have to put
4 on some evidence if they wanted to get higher than that, and
5 there hasn't been any. I don't think they can rely on the
6 idea of, Well, probably we would have come up with some
7 evidence if we had to prove that in a different way.

8 Now, they absolutely did agree to drop that charge,
9 and I don't dispute that.

10 THE COURT: All right.

11 MR. DAVIS: But we would have heavily disputed the
12 amounts. And even if we hadn't, it would have been a
13 substantially lower guideline. Probably we would contend
14 that what the evidence actually shows would be a guideline
15 that was no greater than what he has right now. So I don't
16 think that the idea that this was the significant benefit
17 that cuts against all of Mr. Litteral's good deeds. I think
18 that is misleading at best.

19 Now, a couple other things --

20 THE COURT: I mean, the Government did charge --
21 there were two counts that were -- are to be dismissed in a
22 few moments -- three counts to be dismissed. And two of
23 those are drug trafficking counts.

24 MR. DAVIS: Yes. That's correct, Your Honor.
25 Though we don't think the facts would have sustained the

1 conspiracy count. But be that as it may --

2 THE COURT: Oh.

3 MR. DAVIS: -- the guidelines would be the same for
4 the -- for an actual distribution.

5 THE COURT: Right. It wouldn't make any difference
6 there. But you're -- you're -- you're correct. The
7 Government would have to find another co-conspirator, but it
8 doesn't have to be. It can be unidentified, though.

9 MR. DAVIS: True, but I don't think they'd have it,
10 even that.

11 Be that as it may, we'd also dispute that they
12 would have prevailed on the account for Mr. Campbell. What
13 we do not dispute is that they absolutely dismissed that, the
14 actual distribution count. That is absolutely their -- you
15 know, they did that, and that was their choice, and
16 Mr. Litteral is very appreciative of the Government in that
17 regard. But it would not have ended up with him having a
18 guidelines substantially higher than where he is. I don't
19 think that is accurate.

20 The other thing that I do not think is -- well,
21 maybe "fair" is the word in regards to the segments that
22 Mr. Savage read from the phone calls from Mr. Litteral, when
23 Mr. Savage refers to the defense having noted a
24 misrepresentation. I think it's fair to say there's at least
25 some omission here. What he did not read in that exact same

1 phone call where he read -- he didn't read --

2 THE COURT: Well, that -- I -- I understand that.
3 You put that in writing in your --

4 MR. DAVIS: Good.

5 THE COURT: -- filing on April 6.

6 MR. DAVIS: Yes, Your Honor. And I'm glad the
7 Court --

8 THE COURT: What you refer to as, quote, the wife
9 call.

10 MR. DAVIS: I appreciate that, Your Honor. And so
11 I will not go over that again. But I think that when you
12 actually look at it, it is substantially a different story
13 than it is portrayed.

14 The last thing --

15 THE COURT: But he did say -- he did say what
16 Mr. Savage said.

17 MR. SAVAGE: No, he did not. The one thing he did
18 not say is "if they come and get my guns." That was what
19 Mr. Savage started his quote with. Ms. Litteral said, Are
20 they going to come and get guns? And he started by saying,
21 no. No.

22 THE COURT: Right. But then he went on to say,
23 Well, they better not because it would be a hell of a fight.

24 MR. DAVIS: Right. And that is substantially
25 different. It's this active plan to go attack that is being

1 portrayed. What the act of plan was was to go to lawfully
2 elected officials and propeal through lawful means. That is
3 clear in the preceding four minutes of that call, which it
4 did not print out verbatim because it would be quite lengthy.

5 But the preceding four minutes of that call, the
6 surveillance of him talking to Mr. Campbell and the human
7 source around that same time, his calls to the NRA to seek
8 assistance, Mr. Litteral was looking for redress through
9 lawful means.

10 Now, of course, he had, in fact, committed a crime
11 at this time. But the point is simply this idea that he was
12 ready to take up arms and start shooting people the next day
13 is a dramatic overexaggeration based on his reaction to a
14 hypothetical that he himself did not pose.

15 The final -- but I do think there's another point
16 to be made out of the call, which is the end of it which
17 Mr. Savage stopped, I think, before saying the end of it,
18 which he ended that statement by saying, I'm just getting
19 paranoid as hell. And that goes back to, you know, where
20 does the PTSD come in. I'm just getting paranoid as hell.
21 That's PTSD. That is as classical as it gets. So I think it
22 does figure into this equation.

23 All of these things come together, and I think in a
24 reasonable consideration of who Mr. Litteral is, his service
25 to this nation and the combination of circumstances that

1 brought him here, 12 months and a day is a reasonable and
2 correct sentence that is sufficient, but not greater than
3 necessary, to meet the objectives in 3553(a).

4 THE COURT: Thank you.

5 Ten seconds, Mr. Savage. Nothing.

6 MR. SAVAGE: Your Honor, I don't want to quibble.
7 We have -- we have -- Mr. Barker was interviewed more than
8 once. I would point out that on the 14th of September where
9 we debriefed him again, he said, quote, he paid probably \$6
10 for Hydro, 24 for Oxy, estimating he would have received
11 approximately 100 Hydro and 50 to 60 Oxy per month. He's not
12 aware of who was prescribing the pills.

13 Barker would almost always go to Litteral's house
14 to pick up his pills but only saw his wife. Before he said
15 approximately two to two and a half years ago Barker
16 became -- began purchasing Hydrocodone and Oxy from Litteral.
17 Barker was uncertain if they were -- Barker was uncertain if
18 they were Oxycodone or OxyContin but described them as a
19 greenish color and having the letter OP and EDM on them. He
20 believed that Litteral sold them to him because he was a sure
21 thing and didn't have to worry about Barker telling anyone
22 because he was a loaner.

23 I would note that in the -- in Count Six of the
24 indictment that we begin the date on October 6, 2014, which
25 is the day of the congressional act that moved OxyContin from

1 a Schedule III to a Schedule II.

2 I don't want to parse back and forth whether
3 Mr. Davis can prove or disapprove or whether we would have
4 been able to prove 100 pills. I think the Court gets the
5 gist of it.

6 There is a significant departure based on this
7 charge bargain, and I think that it's obvious that the fact
8 that OxyContin, whether it started in 2000 -- November of
9 2015 or otherwise, based on this particular fact there was a
10 substantial discount also already because of the charge
11 bargain the Government made.

12 At the time Mr. Davis was grateful for it.
13 Apparently, at this particular time he wants his cake and eat
14 it too. I think that the facts speak for themselves. If the
15 Court has any questions whatsoever. It is never the purpose
16 of the Government to misrepresent anything to this Court, and
17 we would not do so.

18 I do specifically say -- remember mentioning the
19 paranoia in connection with the PTSD, and we never said that
20 Mr. Barker didn't say that he would try and get through this
21 with lawful means, but as soon as he got done with that, he
22 went on a rant about how he was going to kill anybody who
23 came to take his guns. I think that's a fair assessment of
24 the evidence. Everybody is entitled to their opinion.

25 THE COURT: All right. Thank you.

1 MR. DAVIS: Your Honor, I do need to note one thing
2 for the record, which is that that report was never produced
3 in discovery. And it does trouble me that there may be *Brady*
4 material involved, because I have never seen this, a period
5 before Mr. Barker.

6 MR. SAVAGE: Here you go. I'll look at it.

7 But he also said that he never received the
8 evidence that was the basis of Gander Mountain, and the
9 evidence that I filed with respect to 302 on Gander Mountain
10 has a -- has a Bates stamp on it. So, I mean, you might
11 check your record before you find out.

12 MR. DAVIS: This does not have a Bates stamp on it.

13 MR. SAVAGE: No, this is one I got from my -- from
14 the FBI.

15 MR. DAVIS: We produced -- we printed this --

16 MR. SAVAGE: If there's something missing --

17 THE COURT: Well, one speak at a time.

18 MR. SAVAGE: If there's something missing, he has
19 it now. Let him read it. I will certainly apologize if
20 that's the case. But it's a two-page -- it's a two-page
21 brief. I'll go back and I will have my database with me.
22 I'll go look for it. If it's not there, I'll have an
23 apology.

24 MR. DAVIS: And I did -- I did review all of the
25 discovery to the best of my ability over the past few days to

1 see if this -- from Mr. Moss had been produced. I did not
2 find it. Previously -- you know, it was produced last week.
3 Don't get me wrong. It has been produced prior to this
4 hearing, obviously. "This" being Mr. Moss's interview.

5 THE COURT: So you did get it last week?

6 MR. DAVIS: I did get Mr. Moss's.

7 THE COURT: Right.

8 MR. DAVIS: Agent Moss's. Sorry.

9 Mr. Barker's second debrief, we were not even aware
10 there was a second debrief until Mr. Savage just said it. It
11 makes me -- I don't have any of these 302s. I may not have
12 any at all.

13 THE COURT: Well, if there's anything exculpatory
14 in there, then that's an issue. But I don't believe there's
15 -- from what Mr. Savage read, it's not exculpatory; it's
16 inculpatory. And it's the -- Rule 16 doesn't specifically
17 require the disclosure. But I know generally the U.S.
18 Attorney's Office does turn over everything, but they have
19 exceptions to protect the confidential sources and some other
20 things related to that.

21 Well, the Court will proceed. That's an issue
22 which is not --

23 MR. DAVIS: Well, Your Honor, I would just note for
24 the record, that in here it states that Mr. Barker filed all
25 serial numbers and drilled holes in the top of end caps

1 previously that have been presented as though that may have
2 been Mr. Litteral that did this. This was, of course,
3 pre-plea. I would argue that right there is to some degree
4 exculpatory.

5 I don't know if this is relevant. I'm not making a
6 *Brady* motion at this point. I'm not making -- I'm not
7 claiming a *Brady* violation at this point. At this stage I am
8 not sure that this has an ultimate impact. What I do want to
9 convey to the Court is we have not had the opportunity to
10 look and address this evidence, and the Court shouldn't
11 either.

12 MR. SAVAGE: Your Honor, it's nothing more than
13 what's in the first -- it's basically what was in the first
14 interview. I mean, if the Court wishes to disregard it, I
15 don't have any objection to that. I mean, I believe we gave
16 him everything. I'd have to go back and check with
17 production.

18 THE COURT: Do we maybe come back at 4:00 o'clock
19 and shake out any little things like this? Because I'm a
20 little concerned that -- you know, I can't disregard that,
21 but I also heard that. What if we come back at 4:00 o'clock?

22 MR. SAVAGE: Your Honor --

23 THE COURT: Oh, come back at 3:00 o'clock.

24 Because we've done everything except for shaking
25 out these -- these issues of some interviews. I mean, I

1 really do think you need to have an opportunity to read any
2 -- a report like this. Although I'm not saying the
3 Government had an obligation to turn it over to you, but I
4 think now that we've drifted into it.

5 MR. SAVAGE: Your Honor, we'll withdraw that other
6 one --

7 But here's the -- here's what it said in the first
8 interview. This is the one on 8/24 -- 8/1. This is a
9 summary. I think the defendant -- defense counsel agrees --
10 provided it for purposes of this point. Litteral provided
11 Barker with Hydro, a/k/a yellow, for 4- to \$5 each and Oxy
12 for \$25 each. He has been purchasing pills from Litteral for
13 one to two years.

14 I think it proves the point. It's basically the
15 same thing that was said in the --

16 He also said Barker advised him to buy pipes and
17 end caps to Litteral. He had purchased them in a hardware
18 store on two separate occasions, but then Litteral believed
19 they were from a workplace. Barker purposely provided the
20 wrong sized caps to Barker [sic] because he knew he was
21 making explosives and didn't want to be part of it.

22 The only thing that's not in here is that he
23 drilled holes in them, but clearly the Government's position
24 has always been did not charge this is because the conspiracy
25 because Barker did not agree with Litteral to make --

1 Litteral believed he did, but he did not.

2 So for all those reasons the second interview,
3 which we believe was turned over, but even if it wasn't, is
4 nothing more than an amplification of the first.

5 THE COURT: All right.

6 MR. DAVIS: I -- I actually do disagree that he
7 states a time frame in that interview to the point -- to the
8 extent that that's relevant to the Court. But I think having
9 watched that interview numerous times, I don't think he
10 actually does says a time frame.

11 However, be that as it may, I also, you know, think
12 that at this point to the extent the Government has withdrawn
13 its evidence of that second interview and to the extent the
14 Government represents here, which I'm sure that Mr. Savage
15 will, that it has produced all -- you know, all of these,
16 unless there's something else, I think that, you know, if the
17 Court is -- is, you know, pretty much prepared to rule on
18 this.

19 THE COURT: Right.

20 MR. DAVIS: The ultimate point that I feel is it's
21 an ex post facto violation if you try to use the 2015
22 guidelines and it applies to the guidelines, whether or not
23 the statute has changed.

24 THE COURT: All right. Why don't we just leave it,
25 and I will consider no more than the fact that there clearly

1 was a charge bargain here. We don't know what -- how severe
2 the drug charges would have been. But clearly, the defendant
3 has not been charged with drug trafficking, even though
4 there's no denial that he was involved in drug trafficking by
5 the defense.

6 MR. DAVIS: Right. I mean, I guess technically he
7 was charged, but it's been dismissed.

8 THE COURT: He was charged, but we're dismissing
9 Counts Five and Six in the next five minutes probably.

10 MR. DAVIS: Correct.

11 THE COURT: All right. So if we leave it at that,
12 then I think we're -- we don't have an issue with regard to
13 discovery. I just won't be considering the quantity of
14 drugs. And, therefore, since I'm not considering the
15 quantity of drugs, I am not looking at the severity of the
16 drug offense, but I am aware that the defendant has admitted
17 to drug trafficking, even though he has not been -- he is not
18 admitting to the Counts Five or Six.

19 All right. The Court wants to note there are no
20 identifiable victims in this case. The Justice for All Act
21 and Mandatory Victim Restitution Act do not apply. The
22 counts of conviction all deal with society, the United States
23 of America being the victim.

24 I believe there's a -- there is some criminal
25 forfeiture I guess of --

1 MR. SAVAGE: Yes, Your Honor.

2 THE COURT: -- some -- some items, but I'll
3 incorporate the consent judgment in the final judgment.

4 Has there -- has there been a consent judgment? I
5 don't know if there has been.

6 MR. SAVAGE: Your Honor, unfortunately,
7 Mr. Bradford usually is here with his papers. He's retired.
8 If there's not --

9 THE COURT: No, I -- there it is, Document No. 37.
10 Okay. I found it.

11 MR. SAVAGE: It is the -- it is the pipe rifle
12 powder, the pipe nipples, end caps, ammunition, various
13 things.

14 THE COURT: Thank you.

15 Mr. Litteral, would you please stand.

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Mr. Litteral, there's a three-step
18 process this Court must go through in determinating the
19 appropriate and reasonable sentence in this case. This
20 three-step process is set forth in a series of Supreme Court
21 decisions, starting with *United States v. Booker*.

22 The first step in the process, the Court's required
23 to calculate the advisory guideline range. As you're aware
24 at the beginning of this hearing, we determined your range is
25 24 to 30 months. That's just advisory. The Court is not

1 bound by that, but the Court must calculate it as a starting
2 point for the appropriate sentence in your case.

3 The second step in the process, the Court is to
4 look to the sentencing guidelines manual to see if there's
5 any departure bases that would allow this Court to depart
6 from the 24- to 30-month range. And your counsel has very
7 diligently argued there are two bases for departure, Sections
8 5H1.3 as to mental and emotional conditions, and
9 Section 5H1.1, military service.

10 These -- these particular departures that are found
11 in Chapter 5(h) of the guidelines manual are -- are hard to
12 apply sometimes because of the phrase that I brought up
13 earlier in this hearing, that they are to be considered when
14 the mental and emotional condition or the military service is
15 to an unusual degree and distinguishing the case from the
16 typical cases covered by the guidelines.

17 That -- that is -- that is hard -- we don't have a
18 lot of case law or commentary of the guidelines to help us
19 know exactly what to an unusual degree is, but I will say
20 this: These -- both of these departure factors can be
21 considered individually or in combination. And I think in
22 combination is appropriate in your case because the PTSD does
23 appear to be, at least from the record before this Court,
24 directly related to your military service.

25 Now, there are many other factors that affected

1 your mental health, but I do think a modest departure, and I
2 do emphasize this, modest departure, not a large departure,
3 is appropriate in your case because you are a great hero, and
4 I thank you for your military service. A Bronze Star is
5 given out pretty freely, but a V for bravery is rarely given
6 out. I understand that. So you really and truly are an
7 American hero, but just because you're an American hero
8 doesn't mean you're exempted from the laws of this land.

9 More on that in a moment.

10 But in combining those two, I do think looking at
11 them in combination, there is a basis for departure, but I'm
12 going to explain why it's a modest departure in a moment.

13 So I am granting the departure for your mental
14 condition of PTSD and for your distinguished military
15 service.

16 The third -- and I'll give measurement of that in a
17 moment.

18 The third and usually the most important step in
19 the sentencing process, but in your case the departure step
20 was pretty important, the Court must consider a series of
21 sentencing factors at Title, 18 U.S. Code, Section 3553(a).
22 Those sentencing factors were enacted by Congress to guide
23 courts in fashioning sentences that are sufficient, but not
24 greater than necessary, to accomplish the goals of
25 sentencing. I have considered all of the sentencing factors.

1 I want to highlight some that are particularly important in
2 your case.

3 First is your history and characteristics. Like I
4 said a moment ago, thank you for your military service. You
5 literally put your life on the line to protect our freedom
6 and liberty. But, you know, one thing you also did as part
7 of your military service, and Mr. Savage alluded to it, is
8 that the day you enlisted, you raised your right hand and you
9 swore to uphold the Constitution of the United States.
10 That's what Marines do. Marines protect the rule of law. In
11 our case, the rule of law is the Constitution and the
12 statutes that have been enacted pursuant to that
13 constitutional authority empowered in the legislative and
14 executive branches.

15 So when a Marine -- and I call you a Marine because
16 there's no such thing as a former Marine. "Once a Marine,
17 always a Marine."

18 THE DEFENDANT: Yes, sir.

19 THE COURT: As a Marine, you know that you have a
20 duty to uphold the rule of law. And you defied that duty,
21 and I know that must trouble you.

22 The part of the problem I've had today and through
23 your case has been this tension between paranoia and
24 terrorism. And, you know, the Government properly
25 investigated this case with vigor because of some evidence

1 suggesting that you were attempting to do something that is
2 inconsistent with upholding the rule of law; that was,
3 interfere in ongoing military operations and possibly commit
4 violent acts.

5 Now, the Government hasn't proven that today. They
6 argued that as motive, and that's totally appropriate. But
7 you're guilty beyond a reasonable doubt to the three counts
8 to which you've pled guilty. And -- and those do show, those
9 counts show that you had a certain degree of paranoia in the
10 way you acted. It was certainly related to your PTSD. It's
11 probably related to your own drug problems.

12 No one is saying today you are a domestic
13 terrorist; although, I think everyone is saying that you said
14 some things that were very severe and suggests paranoia. But
15 I -- but I don't want anyone to misunderstand the
16 Government's vigor in this case was absolutely appropriate.
17 The Government, when it gets a hint of a domestic terrorist
18 act, has to focus on that 100 percent until it rules out the
19 possibility of domestic terrorism.

20 So that's -- your history and characteristics are
21 very much advisory -- aggravate against you in the sense that
22 you are a Marine and you had a duty to uphold the rule of
23 law. And they mitigate in your favor because you were a
24 Marine and you've done so much for this country. It's a
25 conflict that it's tough for this Court to resolve.

1 The Court's also concerned about the nature and
2 circumstances of the offense, and I said that through the
3 course of this hearing. There's no doubt you were selling
4 drugs to someone that was addicted. And there's no doubt you
5 went and purchased a firearm for someone who was a drug
6 addict and felon. And that is something that is really not
7 in debate in this country right now.

8 While we're debating the breadth of the Second
9 Amendment, no one is debating the issue about people that
10 have been adjudicated to have lost their rights to possess
11 firearms should get around that by having straw purchasers.
12 I mean, that is the big debate, that we aren't doing enough
13 to limit the possession of firearms by certain people who
14 have mental illnesses or are drug addicts or convicted felons
15 or committed misdemeanor crimes or domestic violence. I
16 mean, we are -- that's the one area where there seems to be a
17 little debate. And that's what you did. You allowed a wrong
18 person to get -- you were intending to have the wrong person
19 get possession of a firearm.

20 I'm also very concerned about general deterrence,
21 and I understand that the Justice Department has been doing
22 some studies that say maybe we don't have that much general
23 deterrence from sentencings, but Congress has recognized that
24 the purpose of sentencing is general deterrence, deterring
25 others from this criminal conduct. So I think to sentence

1 you in a way, at least as Congress has said in considering
2 the sentencing factors, in a way to discourage others like
3 yourself from making straw purchases to convicted felons.

4 And I am -- I am concerned about general deterrence.

5 Specific deterrence, deterring you in the future
6 from doing this, I am not at all worried about that. I am
7 certain, I am certain you will never commit another felony.
8 When I saw you in tears because you knew you had victimized
9 your family, that was so sincere. I know the record is
10 clear. You really do care and love your family and your
11 friends, and that -- that is -- their victimization is a
12 collateral consequence of your criminal act.

13 You did receive the benefit as part of your plea
14 agreement of having -- or soon to have the drug charges
15 dismissed. That is something that you have to realize is
16 definitely in your favor, and it's something that the
17 Government rightly points out even though there's a dispute
18 between the parties as to what was -- what would you have
19 been exposed to for sentencing. But nonetheless, it's
20 definitely favorable to you that those charges are being
21 dropped.

22 So ultimately it comes down to, after considering
23 all of the sentencing factors, what is the just punishment in
24 this case. Your counsel is asking for a punishment all the
25 way down to basically almost effectively time served, if you

1 consider time off for good behavior. The Government's asking
2 roughly at this point for 27 months before this Court's
3 earlier ruling. Probably is asking for a larger -- would
4 have been asking for a few more months than that.

5 I -- I do not believe that time served --
6 effectively time served or a variance of one year and one
7 day, which ends up being roughly a sentence of 10 months,
8 because one year and a one day qualifies you for time off for
9 good behavior.

10 For this crime of being a straw purchaser for a
11 convicted felon and a drug addict, I -- I don't think that is
12 a sufficient punishment because we don't want convicted
13 felons possessing assault weapons. I don't think there's
14 much debate in this country about that.

15 I said earlier that you are -- that is a --
16 departure is appropriate in this case because of your
17 military service and your related PTSD, but I did not answer
18 the question what's the extent of the departure. I have to
19 factor in whether others similarly situated to you were
20 sentenced in a way that reflects their role in the offense as
21 compared to you. When I learned that your fellow
22 conspirators received sentences at 21 months and they
23 cooperated much more quickly than you and they provided --
24 they didn't require an indictment. I guess they were -- pled
25 to a Bill of Information.

1 Is that it, Mr. Savage? They pled to Bills of
2 Information?

3 MR. SAVAGE: Yes, Your Honor.

4 THE COURT: All right.

5 I think it would be unjust for you to receive a
6 sentence less than their sentences at 21 months. So my
7 window is -- is for a departure from 24 months is down to no
8 more than 21 months. So you fall in a very narrow range.
9 And I think, though, you do need to be punished a little bit
10 more than those who cooperated much more quickly and saved
11 the Government money in a very critical investigation, had to
12 move quickly because the stakes could have been terribly high
13 if you were involved in an act of domestic terrorism.

14 So ultimately it brings me, even with a departure,
15 which is appropriate, down to a sentence of 22 months. So
16 you will not be released from custody until you serve
17 approximately another year or thereabouts, a little less than
18 that probably, in the custody of the Bureau of Prisons.

19 With that said, the Court will now state a sentence
20 that's sufficient, but not greater than necessary, to
21 accomplish the goals of sentencing. Would invite the
22 attorneys to listen to the proposed sentence so if there's a
23 legal reason why it should not be imposed, you can so advise.

24 The Court proposes the following sentence:

25 Pursuant to the Sentencing Reform Act of 1984 and

1 *United States v. Booker*, it's the judgment of the Court,
2 having considered the factors noted in 18 U.S.C. Section
3 3553(a), that the defendant Walter Eugene Litteral is hereby
4 committed to the custody of the United States Bureau of
5 Prisons to be in prison for a term of 22 months on each of
6 Counts One, Two and Three. All such terms to be served
7 concurrently.

8 The Court calls the attention of custodial
9 authorities that the defendant has a history of mental health
10 issues and recommends the defendant be allowed to participate
11 in any available mental health treatment programs while
12 incarcerated.

13 Upon release from imprisonment, defendant shall be
14 placed on supervised release for a term of three years. This
15 term consists of terms of three years on each of Counts One,
16 Two and Three. All such terms to run concurrently.

17 Within 72 hours of release from the custody of the
18 Bureau of Prisons, the defendant shall report in person to
19 the probation office in the district to which the defendant
20 is released.

21 While on supervised release, the defendant shall
22 not commit another federal, state or local crime, and shall
23 comply with the standard conditions that have been adopted by
24 the Court in the Western District of North Carolina.

25 It is further ordered that defendant shall pay to

1 the United States a special assessment of \$300.

2 The Court finds that defendant does not have the
3 ability to pay a fine, interest or attorney's fees. The
4 Court, having considered the factors noted in 18 U.S.C.
5 Section 3572(a), will waive payment of a fine, interest and
6 attorney's fees in this case.

7 Defendant shall forfeit defendant's interests in
8 properties identified by the United States.

9 And the Court incorporates by reference the consent
10 judgment of forfeiture, which is Document No. 37 in the
11 Electronic Case File.

12 Payment of the criminal monetary penalties shall be
13 due and payable immediately. The Court has considered the
14 financial and other information contained in the presentence
15 report and finds that the following is feasible:

16 If the defendant is unable to pay any monetary
17 penalty immediately, during the period of imprisonment,
18 payment shall be made through the Federal Bureau of Prison's
19 Inmate Financial Responsibility Program. Upon release from
20 imprisonment, any remaining balance shall be paid in monthly
21 installments of no less than \$50 to commence within 60 days
22 until paid in full.

23 Throughout the period of supervision, the probation
24 officer shall monitor the defendant's economic circumstances,
25 and shall report to the Court with recommendations, as

1 warranted, any material changes that affect the defendant's
2 ability to pay any court ordered penalties.

3 Place of designation?

4 MR. DAVIS: As close to Gastonia as possible, Your
5 Honor.

6 And given his -- the drug issues highlighted in
7 Dr. Cohen's report, we'd also ask he be allowed to
8 participate in any appropriate treatment that would
9 available.

10 THE COURT: The Court would recommend to the Bureau
11 of Prisons that the defendant be designated as close to
12 Gastonia, North Carolina, as possible and provide the
13 defendant substance abuse treatment.

14 I think based on the sentence and on that time
15 served, he wouldn't qualify for the RDAP program, would he?

16 MR. DAVIS: I think -- I think that is likely true,
17 Your Honor. Those rules have -- those guidelines have
18 shifted a little bit. So I would ask the Court to keep that
19 open, but I think the Court is probably right about that.

20 THE COURT: All right. The Court would add to the
21 proposed sentence that the Court calls to the custodial
22 authorities that the defendant has a history of substance
23 abuse and recommends the defendant be allowed to participate
24 in any available substance abuse treatment programs while
25 incarcerated and, if eligible, to receive benefit of Title

1 18, U.S. Code, Section 3621(e) (2) .

2 And the Court will also impose mental health as
3 well as drug treatment during his period of supervision.

4 Now, I think I've covered everything.

5 MR. DAVIS: I believe so, Your Honor.

6 THE COURT: Now, is there any legal reason why the
7 sentence should not be imposed?

8 MR. SAVAGE: No, Your Honor.

9 MR. DAVIS: No, Your Honor.

10 THE COURT: Mr. Savage, Counts Five and Six are to
11 be dismissed?

12 MR. SAVAGE: Yes, Your Honor. Just to clear for
13 the record --

14 THE COURT: Four, Five and Six.

15 MR. SAVAGE: Yes. The Court is comparing to
16 offense level 16 and 22?

17 THE COURT: Thank you. I am so sorry. I've been
18 -- I've been using "variance" instead of "departure" so long
19 I forgot that you have to calculate the offense level. Thank
20 you. Yes. Sixteen, 16/1.

21 MR. SAVAGE: Thank you.

22 MR. DAVIS: Yes, Your Honor. The Government,
23 pursuant to its agreement with the defendant, moves to
24 dismiss the remaining counts of the indictment.

25 THE COURT: And 16/I is 21 to 27 months.

1 The Court grants leave to the Government to move to
2 dismiss and hereby orders the dismissal of all other counts
3 in the indictment naming the defendant, other than Counts
4 One, Two and Three to which he pled.

5 Now, Mr. Litteral, in exchange for benefits you
6 receive for entering into the plea agreement with the United
7 States, you have waived your right to contest your conviction
8 and sentence either on direct appeal or in a separate civil
9 action, sometimes referred to as a 2255 motion or a habeas
10 corpus motion.

11 You have preserved your right to raise claims of
12 ineffective assistance of counsel and claims of prosecutorial
13 misconduct.

14 Now, do you understand this limitation on your
15 right of appeal?

16 THE DEFENDANT: Yes, sir, I do.

17 THE COURT: All right. Now, if you do choose to
18 appeal, any notice of appeal must be filed within 14 calendar
19 days from the date of written judgment. If you're unable to
20 pay the cost of an appeal, you may apply for leave to appeal
21 at no cost to you. And if you so request, the Clerk of Court
22 will prepare and file a notice of appeal on your behalf. The
23 Court recommends that you talk to Mr. Davis about your appeal
24 rights and procedures.

25 Do you understand these appeal rights and

1 procedures as the Court has stated them to you?

2 THE DEFENDANT: Yes, sir, I do.

3 THE COURT: All right. You're currently in the
4 custody of the U.S. Marshal Service. You'll be transferred
5 to the U.S. Bureau of Prisons for service of your sentence.
6 That takes anywhere from a couple of weeks to a couple of
7 months.

8 Do you have any questions for the Court?

9 THE DEFENDANT: No, sir, I do not.

10 THE COURT: Anything else from counsel?

11 MR. DAVIS: Nothing from the defense, Your Honor.

12 MR. SAVAGE: Nothing from the Government, Your
13 Honor.

14 THE COURT: All right. Then the sentence as
15 proposed is hereby ordered imposed. This case is concluded.

16 Good luck to you, sir.

17 (The proceedings concluded at 12:42 p.m.)

18 * * *

19

20

21

22

23

24

25

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

CERTIFICATE OF OFFICIAL REPORTER

I, Jillian M. Turner, RMR, CRR, CLR, Federal Official Court Reporter, in and for the United States District Court for the Western District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this the 29th day of July 2016.

/s/ Jillian M. Turner
Jillian M. Turner, RMR, CRR, CLR
U.S. Official Court Reporter